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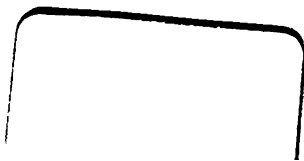
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A

TREATISE,

&c.

A
TREATISE
ON
THE PRINCIPLES AND PRACTICE
OF THE
HIGH COURT OF CHANCERY;

UNDER THE FOLLOWING HEADS:

- I. COMMON LAW JURISDICTION OF THE CHANCELLOR.
- II. EQUITY JURISDICTION OF THE CHANCELLOR.
- III. STATUTORY JURISDICTION OF THE CHANCELLOR.
- IV. SPECIALLY DELEGATED JURISDICTION OF THE CHANCELLOR.

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IN TWO VOLUMES.

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TREATISE, &c.

OF LEGACIES.

After the payment of *debts*, the next duty of an executor consists in the payment of *legacies*.

The ground on which a legatee is permitted to file a bill in equity against an executor, is sometimes said to be founded on the right to a *discovery* of assets ; (a) though the better opinion seems to be, that it is grounded on the supposition of a *trust*. (b) But, certainly, it is not a trust to all intents and purposes, otherwise the ecclesiastical court, or courts of common law, could never have been applied to.

In very early times there appear to have been suits in the court of chancery for the recovery of personal legacies ; but the Lord Chancellor Egerton was of opinion, that the *ecclesiastical court* was more proper to give relief in cases of *legacies, and sometimes he would send parties thither ; but if the defendant answered the bill, and took no exceptions, he would then hear the cause. (c) The assertion, therefore, that, in the time of Lord Nottingham, the court of chancery began to exercise a jurisdiction in respect to *legacies*, (d) is not quite correct. Certain it is, however, that in Lord Nottingham's time, an executor was considered as a *trustee* ; and, in his time, the opinion prevailed, that a legatee is entitled to bring his bill in equity

*2

(a) *Keiley v. Monk*, 3 Ridgw. P. C. and see 7 Ves. 197. and the cases cited, 243. *Harrison v. Buckle*, 1 Str. 239. ante, 1 Vol. 466.

and see 2 Atk. 333. *Jesus Coll. v. ...* (c) *Nurag v. Groom*, M. 9 Jac. cited Bloom, Amb. 55. *Tomlinson v. Gill*, Introduction to Prac. of Chancery, p. Amb. 331. *Bishop v. Church*, 2 Ves. 50.

106.

(d) *La Deeks and Strutt*, 5 T. R. 692.

(b) *Wind v. Jekyl*, 1 P. Wms. 575. ; 692.

against an executor for his legacy, upon the foundation, that the office of executor is a trust.

So also, an executor is considered as a trustee in certain cases for the next of kin ;(f) and the same doctrine of trusteeship has been extended to an administrator, who is also considered as a trustee for the parties entitled to distribution.(g)

*3 After some struggle, it seems now to be conclusively determined, that a pecuniary legacy, though assented to by the executor, (it is different as to a specific legacy assented to),(h) cannot be recovered in a court of common law,(i) because that court cannot, as courts of equity can, oblige a husband suing for a legacy, in right of his *wife, to make a settlement ; a reason, it is observable, which only extends to that particular class of legacies.

The ecclesiastical court has, as to legacies, a concurrent jurisdiction with courts of equity ;(k) but the latter are almost always resorted to, for relief ; because the remedy given by them is more effectual and complete. In courts of equity, executors may be compelled to bring in money, acknowledged to be in their hands ;(l) and may be obliged to give security for a legacy, payable at a future day.(m) So, where a husband claims a legacy, in right of his wife, he is in equity compellable to make a settlement ;(n) and moneys due to infants are, in those courts, advantageously laid out and secured : in all which, the ecclesiastical court is deficient. So, likewise, the ecclesiastical court cannot, in any case, compel an executor to make a distribution of the residue, amongst the next of kin ; because the claim upon him is as a trustee for the next of kin, and that court cannot enforce the execution of a trust,(o) or, as it hath been said, " any thing in the nature of a trust."(p)

(f) 1 P. Wms. 544. Toller on Executors, p. 480. ; and see post.

(g) 1 Vern. 133, 4.

(h) Doe v. Guy, 3 East, 120.

(i) Dicks v. Strutt, 5 T. R. 690. Wright and Butcher, 6 Ves. 676. overruling Hawkes v. Saunders, Cowp. 283. Atkins v. Hill, Cowp. 284. ; and see what is said in Blount v. Bestland, 5 Ves. 517.

(k) Franco v. Alvares, 3 Atk. 346.

(l) Strange v. Harris, 3 Bro. 365.

(m) See as to this, ante, p. 179. etc.

(n) See ante, p. 385. and Anon. 1

Atk. 491.

(o) Farrington v. Knightly, 1 P. Wms. 559.

(p) 3 Atk. 346.

* Owing, therefore, to this deficiency of jurisdiction, suits for legacies are seldom brought in the ecclesiastical court; nor is it, it seems, an *answer to a suit-in-equity on this subject, that a suit is commenced in the ecclesiastical court.(g)

*4

A legacy of a chattel interest; whether it be specific or pecuniary, does not vest, at law, until the executor assents; but in equity he is compelled to assent.(r) and will be decreed to deliver the specific legacies, according to the will.

Before we proceed to the consideration of legacies, it may be proper to make some remarks upon donations; *causa mortis*. There are not many cases on this head. The first appears to be one mentioned in *Peer Williams*. *Donatio causa mortis* is not, in strictness, a legacy, but in the nature of a legacy: and it is not necessary to be proved, with the testator's will, for it operates as a declaration of trust upon the executor.(s)

Gifts of this kind are not good unless made by the party in his last sickness;(t) nor unless an actual delivery; or something tantamount, is made of the thing by the party, or by his order.(u)

If a husband on his death-bed delivers to his wife a purse of a hundred guineas, and bids her apply it to her own use, this is *donatio causa mortis*, and effectual, and will not go to the *executors or administrators of the husband, if there is sufficient to pay debts.(v)

*5

So, likewise, if the husband, being ill, draws on his banker to pay his wife 100*l.* for mourning, this is a good appointment, and it seems it would be so; though the money on the bill were received in the husband's lifetime.(w)

So, if a bond for 100*l.* be delivered to a person, saying, *In case I die it is yours, &c.* this is a sufficient *donatio causa mortis*

(g) See *Hortell v. Waldron*, 1 Vern. 28., which was a suit by an executor for his security; but the principle of the decision seems to justify the passage in the text.

(r) *Day and Trigg*, 1 P. Wms. 287.

(s) *Miller v. Miller*, 3 P. Wms. 367. *Lawson v. Lawson*, 1 P. Wms. 441.; and see the remark on this case, 2 Ves. jun. 111.

(t) *Miller v. Miller*, 3 P. Wms. 367.

(u) 3 P. Wms. 358. *Ward v. Turner*, 2 Ves. 442.

(v) 1 P. Wms. 441.; see also 3 P. Wms. 356. a similar case; and see what is said in *Ward v. Turner*, 2 Ves. 441.

(w) *Ib.* 442.

to pass the equitable interest of the bond on the intestate's death.(x)

A delivery of receipts of annuities, (South Sea annuities, for instance,) is not a sufficient delivery to effectuate a *donatio causa mortis*.(y) Such a donation of stock or annuities cannot be made, without a transfer, or something amounting to it.(z)

Delivering the key of a warehouse,(a) or of a trunk,(b) is considered as a delivery of the contents. So, the delivery of bonds, or bank notes, passes them; but bills of exchange, promissory notes, or checks on bankers, are said to be incapable of being the subject of such donations,(c) they being only evidence of a contract.(d)

*6 *In the construction of legatory bequests, it appears to be a rule, that where the terms used in a will are those of *recommendation*, or *precatory*, or expressing *hope*, or that the testator *has no doubt*,(e) if the *objects*, with regard to whom such terms are used are *certain*, and the *subjects* of property to be given are also *certain*, the words are considered imperative, and create a trust;(f) unless the testator shows by express words or necessary implication that he does not mean to take away a discretion.

Words, therefore, of desire, advice, and recommendation to an executor, are always deemed *legatory*, especially when accompanied with a devise expressly in trust; and convey a right or interest which may be maintained in a court of equity, even though the testator himself should forbid any suit or action to be brought for the performance of his will in that respect. The only cases in which such words are held not to be legatory, is,

(x) Snellgrove v. Bailey, 3 Atk. 214.
8. C. mentioned 2 Ves. 442.; but see what is said in Miller v. Miller, 3 P. Wms. 368.

(y) Ward and Turner, 2 Ves. 431.

(z) Ib. 444.

(a) 2 Ves. 434. Toller on Executors, 182.

(b) Ib. Prec. Ch. 2 Ves. 441. 2 Ves. jun. 116.

(c) Toller on Executors, 192., and 3 P. Wms. 360. 2 Ves. 442. 4 Bro. C. C. 201. there cited.

(d) 2 Ves. 442.

(e) But see Flanders v. Clarke, 1 Ves. 9.

(f) See Harding v. Gliya, 1 Atk. 469. Pierson v. Garnett, 2 Bro. C. C. 45. 8. C. 2 Bro. 226.; following Harland and Trigg, 1 Bro. C. C. 142., and Wynns and Hawkins, Ib. p. 179. Pushman v. Fitter, 3 Ves. 8. Malin v. Keighley, 2 Ves. jun. 333. 529. Paul v. Compton, 8 Ves. 380.; and see Atkins and Wright, 17 Ves. 142.

where they are inconsistent with the antecedent right or interest, devised to that person to whom they are addressed. In such cases, the subject-matter of the recommendation having been once absolutely devised away, it cannot be presumed that the testator intended to use his *subsequent words of recommendation in a legatory sense, which would be to construe his will as inconsistent with itself in one and the same sentence. (g)

We shall proceed to consider the doctrines of the courts of equity, as to, 1. *Specific*, 2. *Vested*, 3. *Lapsed*, and 4. *Conditional* legacies.

1. *Specific legacies* are of two kinds: *First*, When a particular chattel is specifically described, and distinguished from all other things of the same kind, (h) as a bequest of a sum of money in such a bag; or of a bond or other security; or a bequest of money out of such a security; (i) or money in navy bills. (k) *Secondly*, Something of a particular species which the executor may satisfy, by delivering something of the same kind, as a *horse*, &c. (l)

The first kind may be more properly called an individual legacy, and if such, so bequeathed, is not found among the testator's effects, it fails; or if given first to A. and then to B. they must divide it; or if it is disposed of in the life of the testator, it is an ademption of the legacy. (m)

A specific legacy is the same at law and in equity, except in the circumstance, that at law *any alteration is an ademption; but it is not so considered in equity, where it is merely for a *partial purpose*. (n)

Specific legatees have in some respects an advantage over those that are pecuniary, so as to be paid in *lofo* and not in average, on a deficiency of assets: yet, in other respects, they are distinguished to their disadvantage from pecuniary legacies; (o) for if stock specifically given be sold, or, being a lease, be evicted, or, being goods, be lost or burnt, or, being a debt, be lost

(g) See Arg^o. Richardson and Chapman, 7 Bro. P. C. 396. Toml. edit. and see Simmons against Valiance, 4 Bro. C. C. 348.

(A) Puse and Snaphin, 1 Atk. 416.

(i) Lawson v. Stitch, 1 Atk. 508.

(h) Pitt against Lord Camelford, 3 Bro. C. C. 160.

(l) Puse v. Snaphin, 1 Atk. 416, 417; 385.

(m) *Ib*.

(n) Arnold against Arnold, 1 Bro. C. C. 463.

(o) Ashton v. Ashton, 3 P. Wms.

by the insolvency of the debtor; in all these cases such specific legatee is not entitled to contribution from the other legatees; and, therefore, pays no contribution towards them. (p)

The decisions lean against construing a legacy to be specific; (a) because, contrary to the probable intention of the testator, it often proves a hardship upon the specific legatee, who, by an alienation of a part of the property, may find nothing that answers the description; (b) and it often proves hard also upon other legatees, where there happens to be a deficiency.

It is a rule, therefore, that no legacy is to be held specific, unless clearly so intended.

*9

*In those cases, therefore, of demonstrative legacies, where a sum of money is given out of a particular fund, the court is always desirous of construing it as a general legacy, and the particular fund referred to only as that out of which, in the first place, the testator meant it to be paid; (c) and not to follow the fate of that particular fund; and such legacies are considered as specific only, as to the legatee, so as that it shall not abate; (d) but wherever there is a legacy of money out of a particular fund, unless the security is referred to only as the most convenient mode of paying it out of the assets, it is as much specific, as a legacy of a horse, a cow, or any moveable chattel whatever. (e)

The court determines, upon the face of the will, whether the legacy is specific or pecuniary, and does not look into the account of the effects, to see whether that shall be turned into a specific legacy, which, upon the face of the will, is to be taken as pecuniary. (f)

A specific legacy vests immediately from the death of the tes-

(p) Long and Short, 1 P. Wms. 423; and see 2 Black. Com. p. 512.

(a) Ellis against Walker, Amb. 310; and see Webster v. Hale, 8 Ves. 413. Simmons against Vallance, 4 Bro. C. C. 340.

(b) See Sibley v. Perry, 7 Ves. 529; and see Ashburton v. McGuire, 2 Bro. C. C. 108.

(c) See Ellis against Walker, Amb.

310. Chaworth v. Beech, 4 Ves. 566; Roberts v. Pocock, lb. 150. Coleman v. Coleman, 2 Ves. jun. 639.

(d) Coleman v. Coleman, 2 Ves. jun. 640.

(e) Chaworth v. Beech, 4 Ves. 566, 7; and see James v. Johnson, 4 Ves. 555.

(f) Jones v. Johnston, 4 Ves. 573.

testator, and, unlike a pecuniary legacy, carries interest from the death of the testator. (f)

Some very nice distinctions have been made, in regard to what is, or is not, a specific legacy.

*Legacies of stock, whether, *general* or *specific*, are considered as *general* legacies, unless there is any thing in the will to show that the testator intended to confine it to the stock he has at the time of his death. (g)

*10

In some cases, it seems to have been considered, that where a testator has more stock than that which he bequeaths, the legacy is *specific*; from the absurdity of supposing that the testator did not give, out of what he possessed, but that the executors should purchase; (h) but, in a subsequent case, (i) the court held, there must be something more than stock enough to make it *specific*.

If a legacy be, "of my stock," (k) or, "in my stock," or, "part of my stock," the legacy is *specific*; but a gift of, "1,000*l.* out of reduced bank annuities," is a *pecuniary* legacy; (l) and so, where there was a legacy of stock in the 4 per cent. consols, a legacy to the same person, of "an additional sum of 2,000*l.* more to be paid out of the 4 per cents." was held to be a *pecuniary* legacy; (m) and even a bequest of 12,000*l.* of my *"funded property to be transferred, &c."* was held to be a *pecuniary*, and not a *specific* legacy. (n)

*11

Lord Camden was of opinion, (o) that if a sum of money be

(f) *Barrington v. Tristram*, 6 Ves. MS. Mich. 9 Geo. II. 1735. S. C. For. 345.

(g) *Avelyn v. Ward*, 1 Ves. sen. 485. *Parce v. Sharpin*, 1 Atk. 414.; and see *Sleech v. Thorington*, 2 Ves. 562., et.

(h) See *Ashton v. Ashton*, For. 152. S. C. MS. and in 3 P. Wms. 384. In my MS. note of the case, it appears the testator used the words, "his stock," which makes it a clear case.

(i) *Simpsons against Vallance*, 4 Bro. C. C. 249. *Blackshaw v. Rogers*, cited 4 Bro. C. C. 349.

(k) See *Ashburner v. M'Guire*, 2 Bro. C. C. 112.; and see *Ashton and Ashton*,

(l) *Kirby v. Potter*, 4 Ves. 748.; but see Lord Eldon's expression in regard to this case in *Dean v. Test*, 9 Ves. p. 154.

(m) *Dean v. Test*, 9 Ves. 144.; and see *Peterborough against Mortlocke*, 1 Bro. C. C. 565.

(n) *Lambert v. Lambert*, 11 Ves. 607.; and see *Kirby v. Potter*, 4 Ves. 752., and *Sibley v. Perry*, 11 Ves. 523. *Wilson v. Brownsmith*, 9 Ves. 120. which seem to overrule *Ashton v. Ashton*, For. 152. S. C. MS.

(o) See *Attorney General v. Pankie*, Amb. 568.

given, "500*l.* for instance, "due on a bond from A.," the legacy is not specific; but Lord *Thurlow* held differently;(p) and considered the distinction as too slender;(q) but Lord *Camden's* judgment has been since vindicated.(r)

If a testator gives stock which he does not possess, the legatee is entitled to have so much stock purchased; nor is evidence admissible to show there was a mistake in the will as to the fund.(s)

A legacy of 50*l.* for a ring, is not a specific legacy;(t) and if bank annuities be directed by will to be purchased out of personal estate, it is considered as a pecuniary legacy.(u)

If there be a specific legacy of bank stock, and the clause of the will giving the specific legacy is set forth to the bank, they will take care of the interest of the specific legatee; but if that is omitted, it is at the peril of the party, *and the bank, transferring to the executor, would stand discharged.(v)

*12 2. With respect to *vested legacies*, it is to be observed, that the court favours the vesting of interests,(w) and, more especially, of a *residuary bequest*, in order to prevent an intestacy.(x) It is (with some exceptions) an established rule, borrowed from the civil law, that if a legacy be bequeathed to one generally, *to be paid*, or *payable* at the age of twenty-one, or any other age, and the legatee die before that age, this is such an interest vested in the legatee, that it goes to his executor or administrator; for it is *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the *payment*, and not to the *legacy* itself; but if a legacy be bequeathed to the legatee *at twenty-one*; or *if*, or *when*, or *provided*, he shall attain twenty-one, and the legatee die before that age, the legacy is lapsed;(y) and that, whe-

(p) *Ashburner against McGuire*, 2 Bro. C. C. 111.

(q) See *Lord Casleton v. Lord Fanshawe*, 1 Eq. Abr. 298., where legacy held specific, though sum named.

(r) Vid. what is said in *Coleman v. Coleman*, 2 Ves. jun. 640. and in *Chaworth v. Beech*, 4 Ves. 586.

(s) *Chambers v. Minchin*, 4 Ves. 677.

(t) *Apreece v. Apreece*, 1 Ves. and Bea. 384.

(u) *Gibbons v. Hills*, 1 Dick. 334.

(v) *Hartge v. The Bank of England*, 3 Ves. 58. See what is said in *Bank of England v. Lum*, 15 Ves. 579, 80.

(w) *Prescott v. Long*, 2 Ves. 690.

(x) *Bolgar v. Machell*, 5 Ves. 509.

Booth and Booth, 4 Ves. 407.

(y) See 2 Vern. 199. 3 Ves. 15. See *Attorney Gen. v. Milner*, 3 Atk. 114.

Stapleton v. Cheales, Prec. Ch. 317.

Monkhouse v. Holmes, 1 Bro. C. C. 298.

and *Hanson v. Graham*, 6 Ver. jun. 239.

ther the legacy be of money, a chattel, a partnership, or the profits of trade. (z)

Where a legacy out of personal estate has been given "*at*," or, "*after the death*," or, "*at the decease*" of a particular person, it has been held not to denote a condition, that the legatee shall survive such person, but only to mark the *time at which the legacy shall take effect in possession; that possession being deferred on account of some interest in the subject being given to the person on whose death the gift is to take effect (a) but wherever a legacy is given, not as an independent bequest, with a time for payment, or distribution, appointed afterwards, but where the time is annexed to the substance of the bequest, the interests do not vest before that period. (b)

*13

Though, in general, where a legacy is to be paid at a particular day, it is vested, and the time of payment only is postponed; yet there is no case where the court has held a legacy or interest therein, vested, where the certainty of the sum given could not be predicated. (c)

Where there is a clear, vested interest, subject to be divested in a given event; unless that event happens, the representatives of the legatee are entitled. (d)

The giving of interest of a legacy to a legatee, (e) or a provision for his maintenance, until the *time for payment of the legacy, (f) provided it be equal in amount to the interest, (g) vests the legacy; but not, it seems, where the legacy is payable out

*14

(z) *Atkinson v. Turner*, 2 Atk. 41. S. C. Barn. 74.

(a) *Blamire v. Gildart*, 10 Ves. 316.; and see *Barnes and Allen*, 1 Bro. C. C. 181. *Mothhouse against Holme*, Ib. 298. *Attorney Gen. against Crispin*, Ib. 386. and *Benyon v. Maddison*, 2 Bro. 75. there cited; and see *Molesworth and Molesworth*, 4 Bro. C. C. 408. *Roeback and Dean*, Ib. 403. *Bayley v. Bishop*, 9 Ves. 61. *Balmain v. Shore*, 9 Ves. 597.

(b) *Sansbury v. Read*, 12 Ves. 78.

See *Spink against Lewis*, 3 Bro. C. C. 358. *Batsford v. Kebbel*, 3 Ves. 363.

(c) *Maddison v. Andrew*, 1 Ves. 59.

(d) *Smither v. Willcock*, 9 Ves. 234. *Harrison v. Foreman*, 5 Ves. 207.

(e) *Saunders v. Earle*, 2 Ch. Rep. 98. *Anon.* 2 Verd. 199. *Fonnerau v. Fonherau*, 1 Ves. 118. S. C. 3 Atk. 645. *Walcott against Hall*, 2 Bro. C. C. 305. *Haston v. Graham*, 6 Ves. 239.

(f) *Hoath v. Hoath*, 2 Bro. C. C. 3. *Green against Pigot*, 1 Bro. C. C. 105.

Roden v. Smith, Amb. 588;

(g) 3 Bro. 416.

of land; (h) much less, where any thing appears on the will as show the legacy was not intended to vest. (i)

So, where personal property is given to one for life, and after his decease, to another, this is a vested interest in the second taker; and though he dies in the lifetime of the first taker, his representatives are entitled to the legacy, when it becomes due. (j)

Where a legacy is given, to take effect at an indefinite period, it will be considered as vested at the death of the testator (k) and the use of such words as, "when running," "when got in," "when recovered," "when laid out," do not so clearly mark the intention, as to preclude the application of the legal presumption. (m) If, however, the intention is clearly expressed, it must be carried into execution. (n) but the court will not

*15 *conjecture in favour of an intention against the general rule. (v)

A legacy to the children of a husband and wife, is confined to children born at the testator's death. (a) So, a devise to younger children of testator's son, to be paid at twenty-one, vests in those born at the death of the testator. (b)

The law sees no impossibility of having children at any number of years; and the not keeping demands of this sort open, has induced the court to confine such bequests to such children as were in being at the death of the testator, when the number is known, and the proportions they are entitled to, and the time when to receive it. (c)

(h) Gawler and Standewicke, 1 Bro. C. C. 106. in note.

(i) Fonnerau v. Fonnerau, 3 Atk. 845. 8. C. 1 Ves. 118.

(j) See Dawson v. Killett, 1 Bro. C. C. 123, 4. See Moleworth against Moleworth, 4 Bro. C. C. 408. Rostock and Dean, lb. 403. Wadley and North, 3 Ves. 364. Monkypuse v. Holmes, 1 Bro. C. C. 298. Walker and Shore, 15 Ves. 122; and see Hixie and Oliver, 12 Ves. 104.

(k) Hutcheon v. Manning, 4 Bro. C. C. 491. in note, and 8. C. by mistake, called Hutchin v. Mannington, 1 Ves. jun. 366; and see S. P. Stapleton v. Palmer, 4 Bro. 400., and Gaskell v. Harman, 11 Ves. 489.

(m) Wood v. Penoyre, 13 Ves. 336., and Hambling v. Lyster, lb. and 8. C. but not so full, in Ambl. 401.

(n) Elwin and Elwin, 8 Ves. 547. Innes and Mitchell, 6 Ves. 461; and see what is said of that case, 11 Ves. 506., and in Wood and Penoyre, 13 Ves. 336.

(o) Gaskell v. Harman, 11 Ves. 489. 506., and the case there noticed of Innes v. Mitchell, 6 Ves. 461.

(p) Heath v. Heath, 2 Atk. 122.

(q) Hopley v. Chaloner, 2 Ves. 12.

(r) 2 Ves. 84; and see Hales v. Curran, Mich. 2 Geo. II. 1792. M. R. contra, Dennison v. Pockington, Hil. 1744. M. R.

A legacy to A. for life, and to her children at her decease, vests in all the children as they come in *esse*, unless there are circumstances to show that not to be the intention. (d)

But as to the children of A. at twenty-one, and if any die before that age, their share to go to the survivors, does not give a vested interest; and a child born after the testator's death, but during the infancy of the others, is entitled to a share. (e)

*16 In all these cases, it is observable, that if once a share has survived, it will not survive again without express words. (f) In those cases, where a legacy is considered as vested, though liable to be divested, the effect is, that in case of the death of a child, under the age of twenty-one, the produce, at least the interest accrued from the death of the testator, would go to that child; though such child would take nothing in the capital. (g)

So there be a legacy to the testator's three children, to be equally divided between them, share and share alike; but in case of the death of any without being married and having children, the share of such child so dying to be divided between the surviving children; if one should only survive, or if one child married, and has a child, her share is considered as vested. (h)

If a testator has appointed any time subsequent to his death, saying the share each child is to take, that excludes those born after that time. (i) Thus, where there was a bequest to "all the children of A. as they shall severally attain sixteen;" those born after the eldest attained sixteen "were excluded." (k) Under a marriage settlement the construction is different, and is construed to mean, "all children;" and it has been lamented

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(d) *Spencer v. Bullock*, 5 Ves. 483.

(e) *Gilmore against Savers*, 2 Bro. C. C. 582; and see *Congreve v. Congreve*, 1 Bro. C. C. 580.

(f) *Ex parte West*, 1 Bro. C. C. 576.

(g) *Vid. Chaworth v. Hooper*, 1 Bro. C. C. 81. *Deane v. Test*, 9 Ves. 152, 3., and *vid. Lady Lincoln v. Lord Belknap*, 10 Ves. 175; but see *Whitbread v. St. John*, 10 Ves. 154., where the

chancellor seems to think the share vests when the first child attains twenty-one.

(h) *Ball v. Pugh*, 7 Ves. 458.

(i) *Ellison v. Airy*, 1 Ves. Sen. 171. In *Hill and Chapman*, 1 Ves. jun. 406. Lord Thurlow says of that case, "it went on a residuary, but cannot be shaken."

(k) *Heale v. Pratt*, 3 Ves. 730., and *S. F. Andrews v. Partington*, 5 Bro. 401. *Palmer against Hunter*, ib. p. 419. *Freecott v. Long*, 5 Veb. jun. 690.

that the construction of *bequests* is not determined in the same manner. (l)

If a legacy be to the children of *A.* after the death of *B.* those born before the period of distribution will take, unless a time of distribution is expressly provided, excluding all who may afterwards come into existence (m) and they are vested interests. (n)

In cases of this sort, any child, coming in *esse* before a determinate, share becomes distributable to any one, is included (o) even a child by a *second marriage*. (p)

But where the court has ascertained the time as perfectly marked out by the intention of the testator, it is considered as the period of vesting the property in possession, and, consequently, when it comes to be distributed, it must be among those only who are in *esse* at that time. (q)

*18 *If a legacy be given upon a marriage with a given consent, the legacy does not vest before the marriage (r) because, in such cases, it cannot be ascertained whether the contingency will happen or no. (s) "*Dies incertus in testamento conditionem facit*" is the rule of the civil law. But, this doctrine does not apply in the case of a *residue*. Where, therefore, there was a residuary bequest to trustees, upon trust, to pay the dividends, &c. equally, between the testator's two great nieces, until their respective marriages, and from, and immediately after their respective marriages, to assign and transfer their respective annuities or shares thereof unto them respectively, it was held to be a vested interest before marriage. (t)

A legacy to daughters, equally to be divided between them

(l) See *Andrews v. Partington*, 3 Bro. C. C. 404.; see also *Prescott and Long*, 2 Ves. jun. 692.; and see what is said in *Hill and Chapman*, 1 Ves. jun. 407.

(m) *Walker v. Shore*, 15 Ves. 124.; and see *Gilbert v. Boorman*, 11 Ves. 238. and *Godfrey v. Davis*, 6 Ves. 50. *De Visme v. Mello*, 1 Bro. C. C. 537.

(n) *Middleton v. Messenger*, 5 Ves. 140.

(o) See *Gilbert v. Boorman*, 11 Ves. 238. *Whitbread v. Lord St. John*, 10 Ves. 152, S. C. M. S. *Prescott v. Long*,

2 Ves. jun. 690. *Andrews v. Partington*, 3 Bro. C. C. 401.

(p) *Barriington v. Teistram*, 6 Ves. 349.

(q) *Hughes v. Hughes*, 3 Bro. C. C. p. 352, 435. *Godfrey v. Davis*, 6 Ves. 49. *De Visme v. Mello*, 1 Bro. C. C. 537.

(r) *Garbut v. Hiltpo*, 1 Atk. 381. *Athins v. Hiccocks*, lb. p. 500.

(s) *Elton v. Elton*, 3 Atk. 507, S. C. 1 Ves. 6.

(t) *Booth v. Booth*, 4 Ves. 390.

when they arrive at twenty-four years of age, has been held to vest immediately, and only the time of payment postponed; (v) but though it vests immediately, and, in case of the death of either legatee, would go to her executors or administrators, yet they cannot claim the legacy until such time as the infant legatee would have attained twenty-one, (w); unless the whole interest is given in the mean time, (x)

It is different where a bequest is of a legacy to "an infant at his age of twenty-one years, and if the infant dies before twenty-one, then to J. S. in such case, on the death of the infant before twenty-one, the gift to J. S. takes place immediately; because the bequest over to him is as a new substantive bequest. (y)

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A clause of survivorship between two legatees, "if either of them should die," is confined to a case of lapse, and does not prevent the vesting of the legacies. (z)

S. With regard to *lapsed legacies*, it is a general rule that, (unless it be a joint legacy which goes to the survivor, (a) or a tenancy in common with a bequest over to the survivors, (b) if a legatee die in the lifetime of the testator, the legacy is *lapsed*; and the rule is the same, though the will be made in execution of a power. (c)

A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. (d) A legacy to A. and his *representatives*, would lapse, by the death of A. in the life of the testator. (e) So, a legacy to an executrix, or to her heirs, executors, and administrators, lapses by the death of the executrix in the testator's life; (f)

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(v) May against Wood, 3 Bro. C. C. 471.

(w) 2 Vern. 84. 199. Laundry v. Williams, 2 P. Wms. 480. Chester v. Painter, 2 P. Wms. 336, 7. Roden against Smith, Amb. 588.

(x) Amb. 588.

(y) Laundry v. Williams, 2 P. Wms. 480. Papworth v. Moore, 2 Vern. 283. Roden against Smith, Amb. 588.

(z) King v. Taylor, 5 Ves. 806. 3 P. Wms. 113.; and see Hamphrey v. Tayleur, Amb. 136.

(a) Miller and Warren, 2 Vern. 207.

(c) Oke v. Heath, 1 Ves. 135. Duke of Marlborough v. Lord Godolphin, 2 Ves. 73.

(d) Corbyn v. French, 4 Ves. 435.

(e) Elliot v. Davenport, 1 P. Wms. 83. S. C. 2 Vern. 521. Maybank v. Brooks, 1 Bro. C. C. 84. A doubt, however, was expressed on the subject, in Corbyn v. French, 4 Ves. 435.; and see Bridges v. Wood, mentioned in Mr. Raithby's valuable edition of Vernon, 2 Vol. p. 378. note 1.

(f) Stone v. Evans, 2 Atk. 86.

and if a legacy be made one for life, and after the death of that person, to several others, and in case of their deaths to their representatives, and one of the legatees dies in the life of the testator, the legacy lapses. (g) But, if a person says in his will, "I forgive such a debt," or, "that my executor shall not demand it," or, "shall release it," this, it seems, is a discharge of the debt, though the debtor dies in the lifetime of the testator. (h)

It is, however, a general rule, that a trust legacy does not lapse by the death of the trustee in the testator's lifetime; but, that it survives, for the benefit of the cestui que trust. (i)

A testator may, if he pleases, prevent a legacy from lapsing; but to do so, the will must be specially so directed. (j) And the testator must not only declare that the legacy shall not lapse, but, he must likewise nominate the person to take in the event of the residuary legatees. (l)

If a legacy of 500*l.* be given to A., and if A. die before twenty-one, then to B., and if B. die before twenty-one, (in the testator's lifetime, this is not wholly a lapsed legacy, but goes over. (o) B. (m)

It is a general rule, ever since the case of *Poult v. Poult*, (n) followed, as Lord Hardwicke says, by a multitude of cases, (o) that where money is given to be paid at a future time; (p) if payable presently, the rule does not apply. (p) once of a real

(g) 4 Ves. 435.

(h) *Ellis v. Darnley*, 2 Vern. 503. S. C. 1 P. Wms. 87. and see *Sibthorpe v. Moxon*, 3 Atk. 579. S. C. 1 Ves. 49.

(i) *Maggidge v. Thackwell*, 1 Ves. 475. *Oshe v. Heath*, 1 Ves. 140. s. but see *Eacles v. England*, 2 Vern. 468, S. C. Prec. Ch. 200.

(j) 3 Atk. 582.

(l) *Bridge against Abbot*, 3 Bro. G. C. 225. *Sibley v. Cooke*, 3 Atk. 573. *Willing v. Reine*, 3 P. Wms. 113. *Darrell v. Moleworth*, 2 Vern. 378.

(m) *Northey v. Strange*, 1 P. Wms. 343.

(n) 2 Ventr. 366, and S. C. 1 Vern. 204. 381, and S. C. 2 Ch. Rep. 204.

(o) *Hodges v. Rawson*, 1 Ves. 471.

Beckett and Gordon, 2 Atk. 568, reversing *Cave v. Cave*, 2 Vern. 506. Prec. Ch. 201. *Yates and Pettipiece*, 2 Vern. 416. *Duke of Chandos v. Talbot*, 3 P. Wms. 615., and Mr. Cox's note, q. much quoted by Lord Rousby, 3 Ves. 138. *Attorney Gen. and Milner*, 3 Atk. 115. *Prince and Leman*, 3 Ves. 139. *Codrington and Lord Foley*, 4 Ves. 383. The case of *Jackson and Fernald*, cited, 3 Ves. 484., Lord Hardwicke calls an anomalous case.

(p) *Wilson and Spooner*, 3 P. Wms. 172.

estate, and the legatee dies before the time, it sinks into the residue (7).

And whether the legacy be given by a parent (8) or a stranger (9) charged upon land primarily, or as auxiliary to the personal estate (10) and though given with interest (11) yet if the legatee dies before it is payable, the rule is the same, and the legacy sinks into the land; and that as well for the benefit of an *heres factus*, as of an *heres status*. *for equity will not countenance the loading of an heir for the benefit of an administrator (12) or rather, perhaps, because the court will govern themselves, as far as is consistent with equity, by the rules of the common law (13) which, in this respect, agree with the civil law (14).

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If a legacy be charged on both the personal and the real estate, and the personal assets are sufficient, the legacy is payable (15) or if only partly sufficient, then, it seems, so much thereof as the personal estate will extend to pay will go to the executors or administrators of the legatee (16).

The exceptions to the rule are, where the payment is postponed for the convenience of the estate—the circumstances, not of the person, but the fund (17). The intent, too, whose it appears will control the general rule (18). “and,” says Lord Hardwicke, “cases of this sort must be left to the discretion of the court, who are governed by prudential reasons and parti-

(7) *Hall v. Tany*, 1 Atk. 222; and see *Van v. Clarke*, 1 Atk. 512, *Gordon v. Raynes*, 3 P. Wms. 138. *Smith v. Smith*, 2 Vern. 92.

(8) *Harrison v. Naylor*, 3 Bro. C. C. 110.

(9) *Proctor and Abington*, 1 Atk. 425, *Garter v. Bliton*, 2 Vern. 617. S. C. Prec. Ch. 327, which weakens the previous case of *Jackson v. Ferrard*, 2 Vern. 424, as observed by Lord Hardwicke, 1 Atk. 426.

(10) See *Duke of Gloucester v. Bell*, 2 P. Wms. 619.

(11) *Gawler v. Standewick*, 1 Bro. C. C. 102, in 2005.

(12) *Jennings v. Locky*, 2 P. Wms. 277.

(13) *Proctor v. Abington*, 1 Atk. 422.

(14) See *Wendon v. Fell*, 2 Atk. 12.

(15) *Richardson v. Greese*, 3 Atk. 62.

(16) *Ib.* and *Duke Chandos v. Talbot*, 3 P. Wms. 613. *Sherman v. Collins*, 3 Atk. 322; but see *Van v. Charles*, 3 Atk. 512, where legacy given out of a mixed fund was not raised.

(17) *Lowther and Cordon*, 2 Atk. 122. S. C. Barn. 327. *King and Withers*, Prec. Ch. 348.

(18) *Sherman v. Collins*, 3 Atk. 321. See *Lowther v. Cordon*, 2 Atk. 122, confirmed 3 Atk. 322. *Hedgson v. Rawson*, 1 Ves. 47. *Wilson v. Spencer*, mentioned in 1 Ves. 48. *King v. Withers*, For. 137. *Smith against Partridge*, Amb. 266.

*23 "sular circumstances." (d) If portions out of land are given to be paid at *eighteen or marriage, and the party dies before that time, the occasion of raising them, viz. the advancement, ceases, and therefore the reason of giving it qualifies the grant: as an annuity *pro consilio impense* and *impendende*, the counsel is a foundation of the grant; and so, in these cases, the provision for advancement being the reason of the portion, when that fails the portion ceases likewise. It may be compared to what is called, in Scotland, *causa data et non secuta*, where the cause ceases; it is never to be raised for one purpose, when designed for another. (e)

Where portions have been given out of land, and no time of payment expressed, some cases say they are interests vested presently and transmissible; (f) and others, that such portions do not vest if the children die before they want them; (g) but Lord Camden seems to have been of opinion, that in all cases where portions are postponed, without being made payable at twenty-one or marriage, the postponing is for the convenience of the estate, (h) and the legacy is vested, more especially, if a right of entry be given. (i)

*24 If there be a gift in favour of a particular legatee, and he dies, no benefit that legatee could have claimed, if he had survived, can be set up against the persons to whom the estate would come, subject to the disposition in favour of that legatee, if he had lived. If, for instance, a real estate be given to A., and a personal estate to B., exempt from debts; that exemption is to be considered as intended only for the benefit of B., that he shall not pay those debts to which he would be liable if no such provision had been made; and it is not a general exemption of the personal estate. (a)

4. *Conditional legacies* are next to be considered.

Legacies of personal property, given on conditions in *restraint of marriage*, have been the subject of much grave discussion,

(d) *Lowther v. Condon*, 5 Atk. 322.

(g) *As in Brown v. Brown*, 2 Vern.

(e) *Per* 122.; and see *Wilson v.*

430. 6. G. P. Ch. 195.

Spencer, 3 P. Wms. 174.

(f) *Evelyn v. Evelyn*, 2 P. Wms.

(h) *Manning against Herbert*, Ambli.

576.

656. *Earl Rivers v. Earl of Derby*, 2

Vern. 72. 68. 268. *Cowper v. Scott*, 3

P. Wms. 120, 1.

(i) *James v. Hancock*, *Manning a-*
gainst Herbert, Ambli. 575.

(a) *Waring v. Ward*, 5 Vea. 675.

and it would be difficult to reconcile all the cases. Devises of *lands*, upon a condition not to marry without consent, are effectual; (b) but legacies of *personal estate*, on such conditions, are decided upon different grounds; and, whether *precedent* or *subsequent*, have always the most favourable construction put upon them, to prevent a forfeiture, (c) and save a child from being stripped of a provision; especially where there have been no aggravating circumstances, and the end of the father's intention and caution has been attained. In cases of this sort, the court has made such a construction of words as they would not do in other cases. (d) *25

It has been supposed to be an established rule in the civil law, (e) and certainly has long been the doctrine of courts of equity; that where a *personal legacy* is given to a child, on condition of *marrying with consent*, this (unless in those cases where, on breach of the condition, a smaller sum is given in the alternative) (f) is not looked on as a condition annexed to the legacy, but as a declaration of the testator, in *terrorem*; (g) though it can hardly be seriously supposed a testator would hold out the terror of that he never meant to happen. (h) This rule, however, is so strictly adhered to in the ecclesiastical court, that the marrying without consent is not considered there as a breach of the condition, although the legacy is actually given over. But that rule has not been carried so far in courts of equity; for, in such cases, it is, unquestionably, considered as a breach of the condition, and that the legacy is forfeited. (i)

(b) Fry and Porter, 1 Mod. 300. S. C. 2 Ch. Rep. 26; and 1 Ch. Cas. 138.

(c) Daley v. Desbouverie, 2 Atk. 265.

(d) Buxton against Humphrey, Amb. 257.

(e) See Lex Papia Poppæa. In Mr. Hargrave's able argument in Scott v. Vernon, 2 vol. Jurisconsult. Exercitationes, p. 191. &c. he controverts the propriety of attributing the rule to the civil law.

(f) Gillet v. Wray, 3 P. Wms. 234. Greagh v. Wilson, 2 Vern. 523.

(g) Rightson v. Overton, 2 Freem.

21. Jervoise v. Duke, 1 Vern. 20. Garrett v. Pritty, 2 Vern. 293. Reyniah v. Martin, 3 Atk. 331. S. C. 1 Will.

130. Jones and Suffolk, 1 Bro. C. C. 562. Cockel v. Phipps, 1 Dick. 301.

(h) 2 Bro. C. C. 468.

(i) Bellasis v. Erwin, 2 Freem. 171. Rightson v. Overton, Ib. 21. Stratton v. Grymes, 2 Vern. 257. Chaver v. Spurling, 3 P. Wms. 528. Graydon v. Hickes, 3 Atk. 16. Wheeler and Bingham, 3 Atk. 367. S. C. 1 Will. 125. Underwood v. Morris, 2 Atk. 184., contra; but that case overruled in Hemming v. Hunkley, 1 Bro. C. C. 303.

*Wherever a legacy, given on condition of marriage with consent, is charged on the real assets, the condition is not considered as merely in *terrorem*; (a) but it is so considered, where the legacy is not originally a charge upon the land, but the lands are charged, only as auxiliary upon a deficiency of the personal estate: (k) in which case, if necessary, the assets will be marshalled in favour of the legatee. (l)

If the bequest over is merely a *residuary* bequest, it has been much questioned, and still remains doubtful, whether a marriage without consent is a forfeiture of the legacy. In the unprinted case of *Hayward and Paget*, (m) alluded to in *Harvey and Aston*, (n) and in *Scott and Tyler*, (o) by the name of *Paget and Haywood*, Sir Joseph Jekyl expresses himself as follows: "It is a rule in this court, (p) that where a legacy is given (q) on condition of marriage with consent, and if a marriage is had without consent, then, to go over to the residuary legatee, it is the same as if there had been no limitation over at all; and I am of opinion, this case comes within that rule; for here the devise over is to the executrix, and to be at *her disposal, though not for her benefit." At the end of this case it is observed by the reporter, that "it seemed to be against the opinion of the bar."

Lord Hardwicke, also, held, that a devise over, to be effectual, must be a *special* bequest on the event of not observing the condition; and that a residuary devise, unless penned in such a manner as is tantamount to a special devise over, as by especially directing the legacy to sink into the residue, will not avail; (r) and Lord Thurlow seems to have been of that opinion in *Scott and Tyler*: on the other hand, several authorities may be adduced, to show that such a *residuary* bequest is effectual. (s)

and in *Scott and Tyler*, 2 Bro. C. C. 438. S. C. Judgment from Lord Thurlow's own notes, 2 Dick. 731. Stackpoole and Beaumont, 3 Ves. 89. Mercer and Hall, 4 Bro. P. C. 328. Keiley against Monke, 3 Ridgw. P. C. 246.

(i) This was solemnly determined in *Harvey v. Aston*, 1 Atk. 379. and see *Rennish v. Martin*, 3 Atk. 332.

(k) 3 Atk. 333.

(l) *Ib.* 336.

(m) I am in possession of a MS. note of this case.

(n) 1 Atk. 379.

(o) 2 Bro. C. C. 438.

(p) 2 Vern. 303. *Garret v. Pritty*.

(q) And see S. C. 2 Freem. 220.; and see *Semphill and Bayley*, Prec. Ch. 562.

(r) *Wheeler v. Bingham*, 3 Atk. 307. S. C. 1 Wils. 135.

(s) *Lady Kilmarry's* case, mentioned in *Parker v. Parker*, 2 Freem. 69. *Amas v. Horner*, Eq. Cas. Abr. 112. and what is said in *Harvey v. Aston*, 1 Atk. 379.; and see Mr. Hargrave's

Conditions in restraint of marriage *generally*, are, it seems, void; and a condition *absolutely enjoining celibacy*, or tantamount to a prohibition of marriage, would be a void condition.^(s) On gifts or devises of the inheritance, or freehold of lands, almost any condition or limitation, however restricting the right of marriage, unless it amounts to a prohibition of ever marrying, that is, to an absolute injunction of celibacy, has been considered as effectual.^(u)

*An injunction to ask consent is lawful, as not restraining marriage generally. A condition that a widow shall not marry, is not unlawful;^(v)—an annuity during widowhood;—a condition to marry or not to marry *titius*, is good. A condition prescribing ~~the~~ ceremonies and place of marriage, is good; still more is a condition good, which only limits the time to *twenty-one*,^(w) or any other reasonable age, provided it be not used evasively, as a cover intending to restrain marriage generally.^(x)

It is observable in regard to conditions annexed to a devise of real or personal estate, and no notice required to be given, nor any person obliged to give notice, the legatees must perform the condition, whether they have notice or not, (unless in the case of an heir at law),^(y) or cannot be entitled; and if they do not, where there is a devise over, a forfeiture incurs, though they have had no notice.^(z)

If one by will gives legacies, to be paid at *twenty-one or marriage*, which shall first happen, provided they marry with the consent of their father or mother, or the survivor of them, otherwise, *to sink into the personal estate, the legacies vest at twenty-one, and either of them marrying without consent afterwards, is of no consequence.^(a)

Vindication of these authorities, 2 vol. Jurisconsult. Exercitationes, 241, &c.

(f) 2 vol. Harg. Jurisconsult. Exercitationes, 255.

(u) Ib. 256. Co. Lit. 42.

(v) Barton v. Barton, 2 Vern. 306. Scott and Tyler, 2 Bro. C. C. 488.

(w) As to this, see Stackpole v. Beaumont, 3 Ves. 89.

(x) Scott against Tyler, 2 Bro. C. C. 488. S. C. better reported from Lord Thurlow's written argument, 2 Dick.

721. See the observation on the judgment in this case, 3 Ves. 97. and on this subject, Clarke v. Parker, 16 Ves.

(y) Barleton against Humphrey, Amb. 259.

(z) Chancey v. Graydon, 2 Atk. 616.

(a) Desbody v. Boyville, 2 P. Wms.

547. Pullen v. Ready, 2 Atk. 597. and see Knight v. Cameron, 14 Ves. 380. and Osborne v. Brown, 5 Ves. 527. a case decided, it seems, on the same principle.

A condition by will, requiring the consent of trustees to a marriage, has been determined not to be applicable to the *second marriage* of a daughter, who had married between the date of the will and the death of the testator, and was a widow at his death.(b)

Where the condition becomes *impossible*, as where the consent must be of *two*, and one dies, a marriage without consent is good; for it is a naked power, not coupled with an interest, and does not survive.(c)

Where the condition of marriage with consent is a condition *subsequent*, the legatee will keep her legacy, though she marries without the required consent.(d)

*30 If a settlement before marriage be one of the terms on which a legacy is given, and a tender is made of such a settlement, but, by the neglect of *the trustee, it is not made before marriage, it may be made after, and the legacy will not go over.(e)

Where a legacy is given, the greater part of which is to go over, upon marriage without consent of executors; a conditional consent, upon the offer of a settlement, may be retracted, on a subsequent refusal to settle; and a marriage without such consent is a forfeiture.(f)

A consent after the marriage has been held sufficient, where it was not required to be in writing.(g)

If a consent is once given, it cannot be withdrawn by adding terms that do not go to the propriety of giving the consent.(h) And where the consent of parents is required, a *general consent* to any marriage the child may contract is sufficient.(i)

A power of trying how far the grounds are reasonable, upon

(b) *Crommelin v. Crommelin*, 3 Ves. 227.; and see *Hutchinson against Hammond*, 3 Bro. C. C. 146. *Parrell v. Lyon*, 1 Ves. & Bea. 484.

(c) *Ryston against Berry*, 2 P. Wms. 626. confirmed on appeal to the chancellor, MS. Reports; in *Jones and Suffolk*, 1 Bro. C. C. 529., it is said of this case, that "it goes a great way." And see *Show. P. C. 97. Co. Lit. 206.*; but see *Graydon v. Hickes*, 2 Atk. 18.

(d) See *Reynish v. Martin*, 3 Atk. 332.; and see *Burleton v. Humphrey*, Amb. 256. *Garret v. Pritty*, 2 Vern. 293.

(e) *O'Calaghan v. Cooper*, 5 Ves. 117.; and see on this subject, 10 Ves. 244.

(f) *Dashwood v. Lord Bulkeley*, 10 Ves. 230.

(g) *Mercer v. Hall*, 4 Bro. C. C. 328. (h) *Ib. 242.*; and see *Lord Strange against Smith*, Amb. 263.

(i) *Mercer against Hall*, 4 Bro. C. C. 328.

which persons intrusted by parents have given or withheld their consent, is exercised by the court, though it has been termed a very dangerous power.(k)

Where a legacy was given upon condition of releasing all claims upon the testator's estate and effects within a limited time, and the legatee took the legacy, but did not actually release, *it was held he was bound by his election, and that his executors should release. These are considered not as gifts upon condition precedent, which require strict performance, but are conditions annexed to the body of the gift, and pass with it.(l) And so, where legacies were given to four grandchildren, upon condition that, as they came of age, they should release all claims to the testator's estate; the condition, it was held, must be taken *distributively*, and such only as refused to release forfeited their legacies.(m)

A provision in a will, that any legatee controverting the disposition the testator had thereby made of his estate should forfeit his legacy, is held to be *in terrorem* only, and no forfeiture is incurred by contesting any disputable matter in a court of justice,(n) unless there be a devise over on breach of the condition.(o)

A condition inconsistent with the terms of the gift of a legacy is void. As where there was a bequest to A. for life, and at his decease to his heirs, executors, &c. "but if he attempts to dispose of the principal, the legacy to go to another," the condition was held to be inconsistent, and that A. took the absolute interest.(p)

If there is a declaration and undertaking by a *legatee, to do an act, in consideration of the testator's devising to that legatee, the court will decree it, whether such an undertaking was before the will was made or after.(q)

Where there was a legacy, (reciting the probability that the legatee was not living,) upon express condition that he shall return to *England*, and personally claim of the executrix, or in

(k) *Ib.* 245.

(l) *Earl of Northumberland v. Earl of Aylesford*, *Ambl.* 540. and on rehearing, *ib.* p. 657.

(m) *Mawes v. Warner*, 2 *Vern.* 478.

(n) *Powell v. Morgan*, 2 *Vern.* 91.

Morris v. Buttroughs, 1 *Atk.* 404.

(o) *Cleaver v. Spurling*, 2 *P. Wms.* 523.

(p) *Bradley v. Pritchett*, 3 *Ves.* 324.

(q) *Drakeford v. Wilks*, 3 *Atk.* 540.

the church porch, and if he shall not so claim within seven years, to be presumed dead, and the legacy to fall into the residue: the legatee not having returned, and dying abroad within seven years, the legacy was held not to be due: the existence of the legatee, though appearing otherwise, being to be proved by the particular means prescribed; and therefore not within the cases in the civil law, where, the end being obtained, the means were not essential.^(r)

*33 In a case where the legacy was in trust to pay the interest to the separate use of A. for life; and after her decease, as to the capital, for her children; if no child, to pay the interest to her husband during his life; and from and after his decease, *in case he shall become entitled to such interest*, then to pay the principal to other persons; it was held, that though the husband died during his wife's life, and so never became entitled to the interest, yet the limitation over *was* effectuated, and the words, "*in case he shall become entitled to such interest*," were considered not to amount to an *express precedent condition*.^(s)

In another case, where there was a bequest of a residue, in trust, in case A. shall, within six months after the testator's decease, give security not to marry B. then, and not otherwise; to pay to the children of A., with a proviso to go over, if she shall refuse or neglect to give any security; it was held, that she might retract a refusal; and that a bond given within six months, *exclusive* of the day of the testator's death, was a good performance of the condition.^(t)

When Legacy is a Satisfaction.

In the absence of any intent apparent on the face of the will, *(a)* a portion to a child by the will of a parent, if there is any prior provision, and such portion is *equal* to what is secured, is, by implication, *(b)* a *satisfaction*; and if not equal, a satisfaction *pro tanto*, *(c)* unless it is shown clearly, that it is not

^(r) Tulk v. Houlditch, 1 Ves. and Ves. 529. Chaplin v. Chaplin, 3 P. Wms. Bea. 248. 245.

^(s) Pearsal v. Simpson, 15 Ves. 29.

^(b) Webb v. Webb, 2 Vern. 110.

^(t) Lester v. Garland, 15 Ves. 248.

^(c) Chaplin v. Chaplin, 3 P. Wms.

^(a) See Hincliffe v. Hincliffe, 3

247.; but see Mr. Fonbl. observation in 2 vol. Treat. Eq. 324. in n.

so intended, (d) as it may be, not only *by expressions in the will, but by evidence to meet the presumption; but then, and, as it seems, then only, (e) evidence is admissible to fortify the presumption. (f) In one case (g) it is said, that a legacy not so great as the portion will be considered as a satisfaction; but that *dictum* may be doubted.

It has been said the court leans against double portions; (h) but Lord *Thurlow* disliked that expression. (i)

A gift by will, in order to be taken as a satisfaction of a portion, must be of the same nature, and attended with the same certainty as the thing in lieu of which it is given. (k) Land, therefore, is not to be taken in satisfaction for money; nor money for land. (l)

In the case of double provisions by a father for a child, slight circumstances of difference are not regarded; (m) at least, where the question is, not whether a bounty is meant to satisfy a debt, but whether one bounty is to be substituted in the place of another. (n)

*In the case of portions, as both move from the same person, the court will overlook the difference of the time of payment, and consider the legacy as a satisfaction for the portion. Whether the sum be greater or less, is immaterial; but in the latter case, it seems, it will only be a satisfaction *pro tanto*. (o)

In most of the cases on the subject, the testator does not appear to have considered the pecuniary value of the thing he was giving; and the question has generally been, whether, as upon

(d) See *Copley v. Copley*, 1 P. Wms. 146. *Jesson v. Jesson*, 2 Vern. 255.

Lord *Thurlow* doubted as to this rule in *Warren and Warren*, 1 Bro. C. C. 308.; but it is now well established. See *Hinchliffe v. Hinchliffe*, 3 Ves. 527. 529. The subject was much considered in *Hanbury v. Hanbury*, 2 Bro. C. C. 352, 529.; and see *Tolson v. Collins*, 4 Ves. 491. and *Sparkes v. Cator*, *ib.* 530.

(e) *Hartopp v. Hartopp*, 17 Ves. 192.

(f) *Druce v. Denison*, 6 Ves. 398. See *Freemanthe v. Banks*, 5 Ves. 85. where court seemed to refuse such evidence.

(g) *Chaplin v. Chaplin*, 3 P. Wms. 246.

(h) 1 Atk. 427. and 3 Atk. 98.

(i) 1 Bro. C. C. 309.; and see 1 Ball and Bea. 276.

(k) *Barret v. Beckford*, 1 Ves. 521.

(l) *Bellasis v. Uthwaite*, 1 Atk. 426. *Broughton v. Errington*, 7 Bro. P. C. 461. Toml. edit. and see *Bangough v. Walker*, 15 Ves. 512.

(m) 3 Ves. 533. *ib.* 456.

(n) *Hartopp v. Hartopp*, 17 Ves. 191.; and see *Hinchliffe v. Hinchliffe*, 3 Ves. 529.; and *Twisden v. Twisden*, 9 Ves. 427.

(o) 1 Bro. C. C. 310.

entering into a computation of the value of the thing given, it turned out equal to the portion, or the legacy, it should be taken as a satisfaction, the testator not having indicated any idea of his own, whether it was, or was not correspondent in value to the debt which he owed, or the legacy he gave. (p)

Where, by settlement, a sum was provided for daughters' portions, on failure of issue male, and the brother of the daughters, who might have barred them by a recovery, gave them, by will, above the value of the sum secured by the settlement, it was held to be a satisfaction. (q)

*36 Where, under a trust term by the will of the grandfather, for raising portions, it was provided, among other events, that if the children should be by their father in his lifetime advanced and preferred with portions as good, or greater, the term was to cease, it was held, that personal property taken under the intestacy of the father was not a satisfaction. (r)

The question of satisfaction is generally a question of intentions. (s)

Wherever there are circumstances, or a presumption that the testator's intention was not that the legacy should be an ademption of a debt, as where it is given for a particular purpose, *diverse interests*, (t) or where there is an express devise for the payment of debts and legacies, (u) the court have leaned against holding it to be a satisfaction. (v) But Lord Talbot would not allow of parol evidence to show that the testator designed to give the legacy exclusive of the debt. (w)

If a legacy be *smaller* than a debt owed to the legatee, it is not, even *pro tanto*, a satisfaction of the debt; nor is a bequest of specific things considered as a satisfaction; (x) but it is a rule, that a pecuniary legacy is a satisfaction of a debt, provided

(p) Vid. *Bengough v. Walker*, 15 Ves. 512.

(q) *Smith v. Duffield*, 2 Vern. 177.

(r) *Twiden v. Twiden*, 9 Ves. 413. S. C. M. S.

(s) *Atkinson v. Webb*, 2 Vern. 478. *Pearson against Morgan*, 2 Bro. C. C. 388. 2 Atk. 53. *Eastwood v. Vincke*, 2 P. Wms. 616. *Slaney v. Styles*, MS.

(t) *Matthews v. Matthews*, 2 Ves. 635.

(u) *Richardson v. Greese*, 3 Atk. 65. *Hinchliffe v. Hinchliffe*, 3 Ves. 529, 466.

(v) *Nicholls v. Judson*, 2 Atk. 301.

(w) *Fowler v. Fowler*, 3 P. Wms. 354.

(x) *Slaney v. Styles*, MS.

it is equal to, (y) or greater than the debt; (z) but any little circumstance (in which it differs from the doctrine as to the satisfaction of portions) is laid hold of by the court to take it out of the rule; (a) for it has been considered as absurd, (b) not being considered as satisfactory. (c)

And the presumption (arising from the legacy) that the debt is satisfied, may not only appear on the face of the will, (d) but may be rebutted by *parol evidence*. (e)

If the debt due to the legatee be upon an open or running account, so that it might not be known to the testator whether he owed any money to the legatee, the legacy will not be considered as a satisfaction of the debt. Nor is a legacy a satisfaction of a debt contracted after the making of the will: for, in these cases, the legacy could not be intended as a satisfaction. (f) Legacies to servants are never considered as a satisfaction of a debt. (g)

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A legacy is not an extinguishment of a negotiable security. (h) A legacy to an executor excludes him from the undisposed surplus of the testator's estate; (i) but it will not be a

(y) *Browne v. Dawson*, 2 Vern. 498.

(z) *Wallace v. Pomfret*, 11 Ves. 544; and see *Jeff v. Wood*, 2 P. Wms. 132. In *Crompton v. Sade*, 2 R. Wms. it is said the gift must also be declared to be in satisfaction. See *qu. Richardson v. Greese*, 3 Atk. 67. *Graham v. Graham*, 1 Ves. 263.

(a) *Hinchliffe v. Hinchliffe*, 3 Ves. 529; but see *Wallace v. Pomfret*, 11 Ves. 547., where Lord Eldon says, "If this rule of presumption was once established, and understood to be the rule, it would have been infinitely better, that it should not be destroyed by small observations upon small circumstances; the court trying to find out a distinction. It would have been better either to have abided by the rule, or to have said, boldly, it should exist no longer."

(b) *Matthews v. Matthews*, 2 Ves. 636. 1 Dick. 331. *Barclay v. Wainwright*, 3 Ves. 466.; and see *Eastwood*

v. Vincke, 2 P. Wms. 816. and *Richardson v. Greese*, 3 Atk. 66. *Fowler v. Fowler*, 3 P. Wms. 354. and *Barrell v. Beckford*, 1 Ves. 521.

(c) See what Lord King says in *Chancey's case*, 1 P. Wms. 410.

(d) As in *Richardson v. Greese*, 3 Atk. 66. *Barclay v. Wainwright*, 3 Ves. 462. The case of *Foy and Foy*, 1 Bro. C. C. 391. n. is no authority. See 3 Ves. 467.

(e) *Ib.* and see *Totton v. Collins*, 4 Ves. 491.

(f) *Rawlins v. Powel*, 1 P. Wms. 299. *Thomas v. Bennet*, 2 P. Wms. 342. *Cranmer's case*, Salk. 508. *Mascall v. Mascall*, 1 Ves. 324.

(g) *Richardson v. Greese*, 3 Atk. 69.; and see *Wallace and Pomfret*, alluded to in note to 1 Vern. 346.

(h) *Carr v. Eastbrooke*, 3 Ves. 564.

(i) See post.

lowed to operate for two purposes, so as also to be a satisfaction for a debt due from the testator. *(k)*

And, though a gift of a legacy may be so framed as to release a demand, yet, where it was a bond debt, and was uncanceled in the testator's possession, it was held not to be released, no intention appearing to release. *(l)*

A legacy given by the will of a parent, *(m)* or by a husband to his wife, *(n)* is not considered upon any different footing from that of a legacy by any other person, as to the satisfaction of a debt.

A legacy, in order to satisfy a debt, must be payable immediately on the testator's death. *(o)* If, therefore, the debt be payable one month after the testator's death, and the legacy six months after, it is not a satisfaction. *(p)* So, to be a satisfaction, there must be a certainty of payment; therefore, a legacy upon a contingency will not be a satisfaction. *(q)*

*39 *If the legacy be not as certain, as to the duration and commencement, as the thing to be satisfied, it will not be a satisfaction. Where a lady, indebted to a servant for wages, gave by will ten times as much as she owed, or was likely to owe, yet, because made payable one month after her death, so that the servant might not outlive the month, a thing unlikely, the court held it not to be a satisfaction. So, where a parent, indebted to his children, gives them twenty times as much in the whole amongst them, but not payable if they do not arrive at twenty-five years of age, or do not marry, this is not a satisfaction. *(r)*

A gift of a *residue* is a satisfaction for money secured to be paid by marriage articles; *(s)* but is not a satisfaction for a

(k) Matthews v. Matthews, 2 Ves. 637.

(l) Wilnot v. Woodhouse, 4 Bro. C. C. 227.

(m) Tolson v. Collins, 4 Ves. 490. 492. Chave v. Farrant, Ves. 8.

(n) Fowler v. Fowler, 3 P. Wms. 358.

(o) Clarke v. Sewell, 3 Atk. 98.; and see Teacock v. Falkner, 1 Bro. C. C. 296.

(p) Haynes against Mico, 1 Bro. C. C. 29.; and see on this head, Compton v. Sale, 2 P. Wms. 552.

(q) Nicholls v. Judson, 2 Atk. 301.; and see Pollen v. Cressy, 3 Anstr. 830.

(r) Matthews v. Matthews, 2 Ves. 636.

(s) Pearson against Morgan, 2 Bro. C. C. 388.

sum to be laid out in land in fee,^(s) nor is it a satisfaction for a debt.^(t)

As money and lands are things of a different nature, the one is never taken in satisfaction for the other.^(u) Where, therefore, one gave a bond on his marriage, either within four months to settle lands of 100*l.* per annum on his wife, or that his heirs, executors, &c. should pay her 2,000*l.* within four months after his death, and the husband after this devised to his wife lands of 33*l.* per annum, this was held not to be in part *satisfaction #40 for the 100*l.* per annum, but only as a benevolence.^(v)

Having considered the doctrine as to the satisfaction of legacies, we may proceed to state the cases in which a devisee is put to an election.

The earliest case on the doctrine of election is *Noys and Mordant*,^(w) a case of *real estate*, which was followed by *Vincent and Vincent*, a case of *personal estate*,^(x) and by many other cases,^(y) the result of which appears to be, *that a person shall not claim an interest under an instrument, without giving full effect to that instrument, as far as he can.* This rule has been said to be universal, and without exception.^(z) It applies to interests of married women,^(a) interests immediate, remote,^(b) or contingent, of value or not of value.^(c) If, therefore, a testator, intending to dispose of his property, and making all his arrangements, under the impression that he has the power to dispose of all that is the subject of his will,^(d) mixes in his disposition property that belongs to another person, or property as to which another person has a right to defeat his

- (s) 2 Ves. 37. *Alleyne v. Alleyne*. jun. 523. *Lewis against King*, 2 Bro. C. C. 601. *Whistler and Webster*, 2 Ves. jun. 367. *Villareal v. Lord Galway*, 1 Bro. C. C. 292. in note. *Sheddon v. Goodrick*, 8 Ves. 496. *Rich v. Cockell*, 9 Ves. 379.
- (t) *Devese and Pontet*, mentioned in *Proc. Ch. note*, 240. by last editor.
- (u) But see *Goodfellow v. Burchett*, 3 Vern. 238. where this objection was not made.
- (v) *Eastwood v. Vincke*, 2 P. Wms. 613.; and see *Probert v. Morgan*, 1 Atk. 441.
- (w) 2 Vern. 581. *Clarke v. Guise*, 2 Vern. 617. *Morris v. Burroughs*, 2 Atk. 629.
- (x) See 1 Ves. 280.
- (y) *Streatfield v. Streatfield*, For. 176.; and see *Blake v. Bunbury*, 1 Ves. jun. 523. *Lewis against King*, 2 Bro. C. C. 601. *Whistler and Webster*, 2 Ves. jun. 367. *Villareal v. Lord Galway*, 1 Bro. C. C. 292. in note. *Sheddon v. Goodrick*, 8 Ves. 496. *Rich v. Cockell*, 9 Ves. 379.
- (z) 1 Bro. C. C. 292. in note.
- (a) 3 Ves. 385.
- (b) 7 Ves. 480.
- (c) *Wilson v. Lord John Townshend*, 2 Ves. 697.
- (d) But see *Forrester v. Cotton*, Amb. 390. and *Cull against Showell*, Amb. 727.

disposition, giving to that *person an interest by his will, that person will not be permitted to defeat the disposition, where it is in his power, and yet take under the will.(e) A condition is implied either that the devisee shall part with his own estate, or shall not take the bounty.(f) The only instances in which the rule does not appear to apply is,(g) first, where the testator attempts to devise by a will *not duly executed* ;(h) secondly, where an infant attempts to devise his real estate ;(i) for, in these cases, the will not being duly executed, the court cannot read it so far as concerns the real estate ; and, therefore, no evidence of an intention to pass the real estate appears, and consequently no case of election can be raised ; but it has been determined that this doctrine does not extend to the case of an heir claiming under a will ; and also against it a copyhold estate unsurrendered, this being determined to be a case of *election* ;(k) though in a subsequent case it has been said, that if it had been *res integra*, it would have borne a question.(l) And in a recent case it was held, that under general words in a devise an unsurrendered copyhold *did not pass, and that the heir who was benefited by the will should not be put to an election.(m)

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A third exception to the rule before laid down is where there is a devise for payment of debts ; in which case creditors cannot be put to an *election*.(n)

The equity of the court on the subject of election is different from the case of an *express condition*, which must be performed as framed ; and if it is not, that will induce a forfeiture ; but the equity of this court is to sequester the devised interest *quousque* till satisfaction is made to the disappointed devisee.(p)

(e) *Thelluson v. Woodford*, 13 Ves. 220, 1. *Wright v. Rutter*, 2 Ves. jun. 673. 8, C, on appeal, 4 Ves. p. 531.

(f) *Streatfield v. Streatfield*, Atbl. 182, 3. *Brooke v. Monk*, 10 Ves. 800 ; and see what is said in *Andrew v. Trinity Hall Col.* 9 Ves. 533. *Finch v. Finch*, 1 Ves. jun. 53.

(g) *Thelluson v. Woodford*, 13 Ves. 223.

(h) *Ex parte Earl of Rochester*, 7 Ves. 372.

(i) As in *Hearle v. Greenbank*, 1 Ves. 298. 6. C. 3 Atk. 715.

(k) *Hearle v. Greenbank*, 1 Ves. 298. See *Highway against Banner*, 1 Bro. C. C. 588.

(l) *Pettitwood v. Prescott*, 7 Ves. 541.

(m) *Judd v. Pratt*, 18 Ves. 168. S. C. 13 Ves. 396. in appeal.

(n) *Kidney v. Coussmaker*, 12 Ves. 154. *Unett v. Wilkes*, Atbl. 430.

(p) See *Lady Cavan v. Pulteney*, 2 Ves. jun. 500.

If a party is under restraint, and cannot elect, it is the misfortune of the party ; but the consequence is, that while he continues in that situation his claim must be barred.(g)

An election can only take place where a person has a *decided interest* before, and something is left to him by will ;—where there is no *certain* benefit before, there can be no election.(r)

All the cases of election say, the testator must describe the subjects of which he means to dispose ; but, *it seems*, parol evidence may be let in, to show that, though the testator has used words **not so descriptive*, they shall be taken to be descriptive.(s) *43

The cases have not reached so far, as that the benefit of putting a party to an election can ever go to a *residuary* legatee of the personal estate.(t)

If the claim does not break in upon the will, the party is not put to an election. Lord *Hardwicke* puts this case. Suppose, says he, a child is entitled to a rent-charge, or such an interest out of a real estate belonging to his father, who makes a provision for him by legacy or portion, and devises that real estate to another child, without taking notice of the rent-charge ; that child is entitled to the rent-charge, as the father did not show any intent to exclude it ; for that does not defeat the devise, which the court will not suffer.(u)

If a man devises to *B.* lands to which he has no title, and which are the estate and in the possession of *A.* (to whom he gives, by the same will, other parts of his estate,) *A.* must *elect*, and convey his estate to *B.* or he cannot take the benefits under the will. It is only a modification of this rule, where the testator, who has, in his lifetime, by settlement subjected his property to particular encumbrances upon it, afterwards devises it free from encumbrances ; and wherever that is done, the persons who take under the settlement, or others who derive interests under **the will*, must permit the estate to go in the new channel which the will has made. The putting devisees under a will to an election, is a strong operation of a court of equity ; and the *44

(g) *Wilson v. Lord John Townshend*, 400. ; but see *Stratton v. Best*, 1 Ves. 2 Ves. 697. jun. 285.

(r) See *Creech v. Murray*, 1 Ves. jun. 561.

(t) *Earl of Darlington v. Pulteney*, 3 Ves. 385.

(s) *Druce v. Dennison*, 6 Ves. 399,

(u) *Ayres v. Willis*, 1 Ves. 231.

disposition, by the testator, of what he had no right to dispose of, must appear upon the face of the will by declaration plain, or by necessary conclusion from the circumstances disclosed by the will; for no man is to be deprived of his property by guessing or conjecture. On the other hand, the court will not refuse attention to what amounts to a moral certainty of the testator's intention, where that is to be gathered either from the state of the property, or the purview of the will.(v)

If a testator, having power to appoint, makes an appointment by will, which proves invalid, the party taking the benefit of it is not obliged to make satisfaction out of the personal estate, which he took under the same will.(w)

Where a particular thing is given in discharge of a demand, and the party insists on the demand, he must waive not only that particular thing, but all benefit which he claimed under the whole will.(x)

Where a testator entered into a marriage bond to give 2,000*l.* to the wife and children, but if no children, then to the wife; and he by will gave her a life estate in his whole property, she was not put to her election, but took both.(y)

*45 *The wife being entitled to a settled estate, the husband gave her by will an interest in another estate, and all his personal property, in lieu of her claims. The will not being duly attested to pass real estate, she could not take it, but was compelled to elect between the personal estate which did pass and the claims under the settlement.(z)

If *A.* in his will recites the amount of a debt due from him, and by his will orders it to be paid, and gives a legacy to the creditor, he may claim the legacy, and yet dispute the calculation of the amount of the debt by the testator, whose intent was to pay the whole, and give the legacy beside.(a)

There have been several cases in which a man by his will having given a child or other person a legacy or portion in lieu

(v) *Blake against Bunbury*, 4 Bro. C. C. 24, 5.

(w) *Robinson against Hardcastle*, 2 Bro. C. C. 30.

(z) *Graves v. Boyle*, 1 Atk. 509., and the cases there mentioned by Lord Hardwicke.

(y) *Forsyth against Grant*, 3 Bro. C. C. 242.

(x) *Newman against Newman*, 1 Bro. C. C. 186.

(a) *Clarke v. Guise*, 2 Vcs. 617.

and satisfaction of *a particular thing expressed*, has been held not to exclude him from another benefit, though it may happen to be contrary to the will; for the court will not construe it in lieu of every thing else, when he has named a particular thing. (b)

If a man is entitled to an estate, not well devised from him by will, but by the same will has a legacy given to him, and a power in the will to a trustee for him during his minority, and the legacy is paid to the trustee, who fails, the party not having received his legacy, he will not be put to his election. (c)

*An election may, it seems, in some cases, be kept open even for fifty years. (d) No line can be drawn from mere length of time; but it must be from circumstances showing the intent of the party. (e) In a case where a widow had conflicting interests under her marriage settlement, and her husband's will, and she proved the latter, acted under it, and received rents for six years, she was considered as having made an election. (f)

A party in whom a right of election vests, may file a bill to have the debts and legacies paid, and the property cleared, that he may elect to advantage. (g)

Where a freeman of London makes a will, unless it be expressly of his *testamentary* part, (h) a child of such freeman must elect to take by the custom or by the will, and cannot claim part by one, and part from under the other; he must abide by the will *in toto*, or the custom *in toto*. (i) If the child elects to take by the will, the share of such child, under the custom, accrues to the testator's estate, and goes according to his will. (k)

Where a contingent legacy was given to the heir, *on condition* not to dispute the will; and *the will was not executed according to the statute, the heir, when of age, was put to his *election* to claim the legacy, or the lands devised away. (l) Such a con-

(b) *East v. Cook*, 2 Ves. 53.

(c) *Moore v. Moore*, 2 Ves. 603.

(d) *Lord Beaulieu v. Lord Cardigan*, Amb. 633., and on appeal to Lords, 6 Bro. P. C. 232.

(e) *Buttricks against Broadhurst*, 3 Bro. C. C. 90. S. C. 1 Ves. jun. 172.

(f) *Ib.*

(g) *Ib.*

(h) *Biddle v. Biddle*, mentioned in

note to 1 P. Wms. 533. *Frederick v. Frederick*, 1 P. Wms. 722. *Carr v. Carr*, 2 Atk. 278. *Morris v. Burroughs*, 2 Atk. 629.; but see *Babington v. Greenwood*, 1 P. Wms. 533.

(i) *Cowper v. Scott*, 3 P. Wms. 124. *Pugh v. Smith*, 2 Atk. 43. *Harvey v. Desbouverie*, For. 190.

(k) *Morris v. Burroughs*, 2 Atk. 627.

(l) *Boughton v. Boughton*, 3 Ves. 12.;

dition distinguishes the case from that(m) in which it was decided, that where there was a bequest to the heir, and a devise of the real estate to others, and the will was good as to the bequest of the personal estate, but void as to the real, (the devisee being an infant,) the heir was not put to an election.

Though, at law, a devise cannot be averred to be in satisfaction of dower, if the will is silent, yet, sometimes, a court of equity has been induced, by special circumstances, to consider such devises as a satisfaction, and the wife has been decreed to elect.(n) The rule in equity seems to be, that a widow cannot be put to an election to take under the will of her husband, or her dower except by express declaration, or necessary inference from the inconsistency of her claim with the dispositions of the will.(o) A devise, therefore, of the residue of the testator's personal estate does not bar the wife's claim to dower.(p) Notwithstanding the doctrine on which *Lawrence* and *Lawrence*(q) (the leading case on the subject) *was finally decided, and the frequent recognition of that case, devises have often since been deemed a satisfaction of dower, on account of very strong and special circumstances; as where allowing the wife to take a double provision would have been quite inconsistent with the dispositions of the will.(r)

From the final decision in *Lawrence* and *Lawrence*, it is clearly to be inferred, that a mere gift by the husband to the wife, of a larger amount than the dower, is no bar of dower, but that she may claim both.(s)

It has been much controverted, whether a rent-charge given

and see *Carey v. Askew*, noticed in *Shedden* and *Goodrich*, 8 Ves. 496.

(m) *Hearle v. Greenbank*, 2 Ves. 14., and S. C. 1 Ves. 367.

(n) See Co. Litt. 36. b. n. 227., approved in *Strahan v. Sutton*, 3 Ves. 251. *Greathorex v. Cary*, 6 Ves. 616. *Foster v. Cooke*, 3 Bro. C. C. 347.

(o) *French v. Davis*, 2 Ves. jun. 572. *Tinney v. Tinney*, 1 Atk. 8.; and see *Browne and Parry*, 2 Dick. 665.

(p) *Ayres v. Willis*, 1 Ves. 239.

(q) 2 Vern. 385. reversed by Lord Keeper Wright, and the reversal af-

firmed, 1 Bro. P. C. 591. The case of *Vizard v. Longdale*, contra, mentioned 3 Atk. 8. and 1 Ves. 55. appears to have been considered of no high authority. See *Couch v. Stratton*, 4 Ves. 304.

(r) As in *Arnold and Kempstead*; *Ambl. 466.* *Villars v. Lord Galway*, *Ambl. 662.*; and see the judgment in this case reported in 1 Bro. C. C. 292. *Wake v. Wake*, 3 Bro. C. C. 255. 8. C. 1 Ves. jun. 236.

(s) See what is said in *French v. Davis*, 2 Ves. jun. 578. 2 Atk. 427.

to the widow, issuing out of the estate subject to dower, with power of distress, the devise shall operate as a bar, or satisfaction of her dower! Lord *Northington*,^(t) Lord *Camden*,^(u) Sir *Thomas Sewell*,^(v) and Mr. Justice *Buller*,^(w) seem to have considered such devise as a satisfaction of the dower; but Lord *Hardwicke*,^(x) Lord *Bathurst*,^(y) Lord *Rosslyn*,^(z) Lord *Thurlow*,^(a) *and Lord *Alvanley*,^(b) appear to have thought it would not be a satisfaction of the dower. *49

Where one devised an annuity to his wife charged on his real estate, and subject thereto, and likewise to an annuity to another person, devised all his estate to A., &c. it was held, the wife was not entitled to dower and the annuity too, though the annuity was less than the dower.^(c)

The gift of an estate to any person, not the wife, does not exclude her from claiming dower out of that estate, and at the same time taking under the will.^(d) But, where an annuity was given charged upon a devised estate, to part of which she was entitled in tail, she was put to her election.^(e)

Where a testator gave his wife real and personal property in bar of her dower, or thirds; and gave the residue to charities, which were void under the statute, it was held, that the widow was not barred, or to be put to an election.^(f)

Charitable bequests are next deserving of attention. All dispositions (with some exceptions mentioned in the act) of real estate to charity, and personal estate connected with land, as leasehold and mortgages, (though included in a general residue,)^(g) are rendered void by the statute *of the 9 Geo. II. c. *50

(t) See *Arnold v. Kempstead*, Ambh 466.

(u) See *Villareal v. Lord Galway*, Ambh. 466. 462.

(v) *Jones v. Collier*, Ambh 466. 662. 730.

(w) See *Wake v. Wake*, 3 Bro. C. C. 255.

(x) See *Pitt v. Snowden*, mentioned 3 Ves. 252.

(y) *Davis v. Edwards*, mentioned Arg^o. 1 Bro. C. C. 292.

(z) See *Pearson v. Pearson*, 1 Bro. C. C. 292.

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(a) See *Foster v. Cook*, 3 Bro. C. C. 347.

(b) *French v. Davis*, 2 Ves. jun. 578, 579.

(c) *Jones against Collier*, Ambh. 730.

(d) *Strahan v. Stutton*, 3 Ves. 249. *Hitchin v. Hitchin*, Prec. Ch. 133. 2 Freem. 241.

(e) *Wilson v. Lord John Townshend*, 2 Ves. 693.

(f) *Pickering v. Lord Stamford*, 3 Ves. 332. S. C. on appeal, (ib.) 492.

(g) *Attorney General v. Winchelsea*, 3 Bro. C. C. 372.

36., usually termed the *mortmain act*, and that, whether the *charity* be in England, Scotland, or elsewhere.(b)

The statute contains no express words prohibiting a bequest of money, to be produced by the *sale of land*, for charitable purposes; but it is settled by construction, that such a bequest is within the spirit and meaning of the act.(c)

*1. Money may be bequeathed to be laid out in lands *abroad*, for the maintenance of a *foreign charity*;(d) or for a charity in *Scotland*.(e)

Where a devise is to a *superstitious use*, and made void by statute, or to a *charity*, and made void by the statute of mortmain, the property, according to its nature, will go to the heir at law, or next of kin.(f)

Superstitious uses are such as relate to the superstitions of the Roman church, as the saying of masses for the soul of the devisor, or for the support of a chantry priest, or the like.(g) Legacies given to the superstitious uses mentioned in the statute of Edward IV. c. 14., are vested in the crown *beneficially*; and although bequests made in favour of other superstitious uses than those comprised in that act do not vest in the crown *51 *beneficially*, yet the king has the appointment of them to such uses as he may think proper.(h)

A legacy to such purposes as the superior of a convent, or her successor, may judge most expedient, is, it seems, void, as a *superstitious use*.(i)

The *mortmain act* has been termed "*a barbarous act*;" but it is quite otherwise. Far from being a prohibition of charitable foundations, it only restrains the creation of them by "languishing and dying persons to the disherison of heirs:"(k) it

(b) See Curtis and Hatton, 14 Ves. 223.; and see Corbyn v. French, 4 Ves. 537. 433.

(c) See Attorney General against Lord Weymouth, Ambl. 20. and 14 Ves. 541.

(d) Admitted argu°. 14 Ves. p. 540. Oliphant and Hendrie, 1 Bro. 571.

(e) Mackintosh v. Towashend, 16 Ves. 330.

(f) De Costa against De Pae, Ambl.

(g) Duke's Ch. Uses, 106.

(h) See Roper on Legacies, 2 vol. 107., and the cases there mentioned.

(i) Smart v. Praeger, 6 Ves. 567.

(k) See Attorney General v. Lord Weymouth, Ambl. 22. Attorney General and Day, 1 Ves. 223.; and see Attorney General and Bowles, 3 Atk. 306.

does not prevent charity, but the abuse of it.(l) If a man is charitable, and by *deed* conveys to a charity, he may,(m) provided the deed be executed a year before the death of the grantor, and enrolled within six months after the execution.(n) Personal property may be disposed of as before the statute.(o) The particular views of the legislature were two; first, to prevent the locking up of land and real property from being aliened; which is made the title of the act: the second, to prevent persons in their last moments from being imposed on to give away their real estates from their families; for, in times of popery, the clergy got almost half the real property of the kingdom into their hands; and, indeed, says Lord *Hardwicke*, **"I wonder they did not get the rest; as people thought they thereby purchased heaven."*(p)

*52

Nothing is more clearly established than that, under the *stat. of mortmain*, no interest whatever, or charge, or encumbrance on real estate, can be given for a charitable use by *will*.(q) A legacy, therefore, to a charity, charged on real estate, is void.(r)

It has been determined on the statute, that the words "*any estate or interest in lands*," extend to *leaseholds*.(s)

A charitable legacy secured by a *mortgage* is void,(t) and a bequest to pay off a mortgage is void.(v) So, money secured by an assignment of the *poor rates* and *county rates* is within the statute, and therefore cannot pass under a bequest to a charity.(w) It is the same, as to *navigation shares*, and *turnpike bonds*.(x)

A bequest of money to purchase ground and build *alms-houses*

(l) Ambl. 158. and 639.; and see 4 Ves. 427. and Attorney General v. Merrick, 1 Ves. sen. 47.

(m) Blandford v. Thakerell, 2 Ves. jun. 241.

(n) Ambl. 23.

(o) See 1 Ves. 223.

(p) 1 Ves. 223.

(q) Pickering v. Lord Stamford, 2 Ves. jun. 279. Attorney General v. Meyrick, 2 Ves. sen. 44.

(r) Currie v. Pye, 17 Ves. 482.

(s) Attorney General against Tomkins, Ambl. 216.

(t) Attorney General v. Meyrick, 2 Ves. 44. Pickering v. Lord Stamford, 2 Ves. jun. 272. and 581. S. C. 4 Bro. 214. Ambl. 158.; and see Ambl. 368.; and also 16 Ves. 336.

(v) Corbyn v. French, 4 Ves. 418.

(w) Finch v. Squire, 10 Ves. 41.

(x) Howse v. Chapman, 4 Ves. 342. as to money secured on turnpike tolls; see also Kaapp v. Williams, 4 Ves. 430. in note.

is void under the statute ; nor can it be sustained by a bequest to a charitable society, provided they will furnish a piece of ground to build the *alms-houses*, that being, in *effect, the same thing.(y) Where the principal devise, as *land*, fails, the bequest of personal property connected with it fails also: if the primary fails, the subsidiary part fails with it ;(z) but not where the personal property can be separately applied, within the terms of the will.(a)

*53

Where lands were directed to be purchased, and a *school* to be erected, the direction to *purchase* being void, the trustees offered themselves to purchase the land upon which a school might be erected ; but, upon the rule alluded to, all the bequest was considered as void.(b)

*54

A bequest of money to *establish* a school, has been held good, as the master may teach in his own house, or in the church.(c) So, money given to *improve* charity lands.(d) or, for rebuilding, repairing, altering, or adding to and improving land already in mortmain, is a valid bequest, but does not authorize the purchase of land.(e) A bequest of money to enable a trustee for a charity *to complete a contract for the purchase of land would be void.(f)

A bequest for the purpose of building a chapel, upon ground already in mortmain, is legal ; though, to purchase ground for the purpose of building a chapel is not legal.(g) In one case(h) it has been held, that if there is a bequest of money, to be laid

(y) Attorney General v. Davis, 9 Ves. 541, 2.; see Attorney General v. Parsons, 6 Ves. 191.; and see Attorney General against Tyndall, Ambl. 616.; but see what is said in 2 Ves. 189.

(c) Attorney General against Williams, 4 Bro. C. C. 526.

(d) Attorney General v. Nash, 3 Bro. C. C. 595.; and see what is said, 2 Ves. 189.

(e) See Attorney General v. Whitchurch, 3 Ves. 141. Attorney General v. Davis, 9 Ves. 543. 545. Chapman v. Browne, 6 Ves. 404.; and see Grieves and others against Case, 4 Bro. C. C. 67.

(a) Attorney General v. Stepney, 10 Ves. 29.

(b) Attorney General against Nash, 3 Bro. C. C. 588. sanctioned in Attorney General v. Davis, 9 Ves. 542.

(f) 4 Ves. 431.

(g) Chapman v. Browne, 6 Ves. 407.

(h) Attorney General v. Bowles, 2 Ves. 547. F. C. 3 Atk. 805.

out in building a chapel or school, the intention is taken to be, to build, in case a piece of ground already in mortmain could be found for the purpose; but that doctrine has been since overruled,⁽ⁱ⁾

If there be a bequest of money to a charity, and a direction to lay it out in the public funds, till the whole can be laid out in the purchase of lands to the satisfaction of the trustees, this has been held not to be within the statute of mortmain;^(k) but money directed to be invested until an eligible purchase can be had, is a devise of land, and bad.^(l) A bequest of money to be laid out in land, or some real security for a schoolmaster, has been held to be void under the statute.^(m)

If a large personal estate is left to trustees for ^{*55} a charitable use, which they are to direct, and there is no occasion to come to a court of equity for a direction, there is nothing in the statute, restraining the trustees from laying that out in land; because, by the express proviso of the act, all purchases to take effect in possession are good; which is a matter, perhaps, that may want a remedy.⁽ⁿ⁾

In cases where money given in charity is to be disposed of in such manner as *the executors or the survivors shall think fit*, it is considered as a personal trust, which dies with the executors;^(o) and, on their deaths, the king becomes entitled to the disposition of the fund, by his *sign manual*.^(p)

If an heir at law confirms a devise of land to a charity, the court will not take it away; for it becomes the act and deed of the heir.^(q)

A devise to a college is not affected by the mortmain act.^(r)

(i) *Chapman v. Browne*, 6 Ves. 409. and authorities there cited, such as *Attorney General v. Tyndall*, Ambl. 614. *Attorney General v. Hutchinson*, Ambl. 751. 1 Bro. C. C. 444. in note. *Pelham v. Anderson*, 1 Bro. C. C. 444. in note. *Foy v. Foy*, 3 Bro. C. C. 591. See observations in *Attorney General v. Whitechurch*, 3 Ves. 144.; and see *Attorney General v. Parsons*, 8 Ves. 191.

(k) *Grimmett against Grimmett*, Ambl. 210.

(l) *Grievés and others v. Case*, 4 Bro. C. C. 67.

(m) *Attorney General v. Bowles*, 2 Ves. 547.

(n) *Vaughan v. Farrar*, 2 Ves. 183, 189.

(o) *Hibbard against Lambe*, Ambl. 309.

(p) *Attorney General v. Berryman*, 1 Dick. 168.

(q) Ambl. 158.

(r) *Attorney General v. Andrew*, 3 Ves. 641. 649. *Attorney General v. Tancred*, Ambl. 352.

If there be a charitable gift to two purposes, the one good and the other bad, the court will apply the money to good use.(s)

A citizen of *London* cannot (under the custom) devise land situated *out* of London in mortmain.(t)

- *56 *A bequest of money to be laid out in land, for the support of preachers of two chapels, has been held to be a charitable use, within the statute of mortmain;(v) but a bequest of personalty, in trust, for the benefit of a *dissenting congregation*, is enforceable in equity,(w) whether *quakers*, *baptists*, or others.(x)

A bequest to *poor relations* may be sustained as a charity;(y) and a legacy to the *poor inhabitants* of a particular parish, has been holden good, and to go to the poor not receiving alms.(z)

A bequest to the *governors of Queen Anne's bounty* is void, under the statute of *mortmain*, because all their funds must be laid out in the purchase of estates.(a)

A devise of 500*l.* to the church of *St. Helens* was determined to be good, and that it belonged to the churchwardens; and to be employed in the repairing and adorning the church.(b)

A bequest of 1,000*l.*, by sale of lands, to be applied in water works for the use of the inhabitants of a town, is within the statute of mortmain, and void.(c)

- *57 A bequest of a residue, to be employed in such **charitable uses* as the executor shall think proper, is a good bequest;(d) but a bequest for such objects of *benevolence* and *liberality* as the trustee in his discretion shall approve, cannot be supported as a *charitable* legacy, but is a trust for the next of kin.(e)

Where property is bequeathed for a charitable purpose the

(s) Attorney General against Hartley, 4 Bro. C. C. 412.

(t) Middleton against Cater, 4 Bro. C. C. 409.

(v) Grieve v. Case, 4 Bro. C. C. 67.

(w) Attorney General v. Fowler, 15 Ves. 88.

(x) Attorney General v. Cook, 2 Ves. 273.

(y) White v. White, 7 Ves. 423.; see Attorney General v. Price, 17 Ves. 371.; and see Isaac and De Fries, *ib.* p. 373. in note, imperfectly and erroneously reported in Ambl. 595.

(z) Attorney General v. Clarke, Ambl. 422.

(a) Middleton v. Clitherow, 3 Ves. 734. Widmore against Woodroffe, Ambl. 636.

(b) Attorney General v. Ruper, 2 P. Wms. 125.

(c) Jones against Williams, Ambl. 651.

(d) Chapman v. Browne, 6 Ves. 410.

(e) Morris v. Bishop Durham, 9 Ves. 399. and S. C. on appeal, 10 Ves. 522.

law will not allow, as, for instance, the support of a *Jewish synagogue*; (f) or for the education of poor children in the *Catholic faith*; (g) or for a *superstitious use*; (h) the court, though it will not support such a bequest, will yet apply it to purposes of charity, upon the ground (not a very satisfactory one) (i) that, as the property was meant for a *charity*, though it could not be applied to the particular charity mentioned, it shall be applied to a charity pointed out by the court. Thus, the legacy for the support of a *Jewish synagogue* was given to the *Foundling Hospital*; but this doctrine does not apply as to legacies to *charitable uses* made void by the statute *mortmain*. (k)

Where it appears by a will that the substantial intention of a testator is charity, though the mode in which it is directed to be executed fails, by accident, or other circumstances, (l) the court will find some means of effectuating that general intention. (m)

But if the court can find, or may hereafter find, (n) any means of applying the charitable fund to the charity as created by the founder, it will not, upon any general notion that any other application would be more beneficial to the inhabitants of the place, change the nature of the charity. (o)

In a case where the fund devoted to charity became very

(f) *De Costa v. De Pas*, Amb. 228.

(g) *Cary v. Abbott*, 11 Ves. 490.

(h) *Attorney General v. Guise*, 2 Vern. 266.; but see Amb. 228.

(i) This doctrine was first broached, I believe, in the case of the celebrated *Baxter*, 1 Vern. 248. 2 Vern. 105., but was disapproved by Lord Thurlow, in *Moggridge v. Thackwell*, 1 Ves. jun. 469.; and see *Attorney General against Goulding*, 2 Bro. C. C. 430. See also the sarcastic remark of the master of the rolls, 11 Ves. 495. on this doctrine, and what Lord Eldon says in *Moggridge and Thackwell*, 7 Ves. p. 81., and Lord Alvanley, in *Attorney General v. Minshull*, 4 Ves. 14.; see *Attorney General v. Whitely*, 11 Ves. 251.; and see also *Attorney General v. Andrew*, 3 Ves. 633. 7 Ves. 223. 9 Ves. 526. In this case, as reported in 7 Ves. and 9 Ves. it

was held, amongst other things, that a compromise by the Attorney General, is a cy-pres case, binds the next of kin.

(k) *Corbyn v. French*, 4 Ves. 433.

(l) See *Attorney General and Syderfin*, 1 Vern. 224.

(m) *Moggridge v. Thackwell*, 7 Ves. 69. 82.; and see *Attorney General v. Boyer*, 3 Ves. 729. and *Attorney General v. Boulton*, 2 Ves. 388. and 3 Ves. 220.; and see *Attorney General v. Whitchurch*, 3 Ves. 141. and *Attorney General against Green*, 2 Bro. C. C. 492. *Attorney General v. Pyle*, 1 Atk. 436. *Attorney General v. Wassay*, 15 Ves. 231.

(n) See *Attorney General against Oglander*, 3 Bro. P. C. p. 166.

(o) *Attorney General v. Whitely*, 11 Ves. 251. See *Attorney General v. Minshull*, 4 Ves. 14.

considerable in proportion to the objects, the application of the fund was, upon the principle of *cy-près*, extended, against the claims of the next of kin, for the benefit of the same objects, to purposes not expressly pointed out by the will. (p)

- *59 . *If there be a charity for a select number of alms-people, and there are not persons sufficient to answer the description of the charity, the land charged with the payment of the charity is not discharged during that time ; but shall accumulate, and be applied towards the advancement and increase of the charity. (q)

So, where an estate is given to a charity, and the rents are afterwards increased, there is no resulting trust for the heir at law, unless there is a plain intent for the heir ; but the charity has the advantage of the surplus rents ; (r) though Lord Chief Justice *Holt* appears to have delivered a contrary doctrine. (s)

The court of chancery is said to have a general jurisdiction over charities, by issuing a commission, and likewise can give directions for the management of a charity ; but this does not extend to charity schools, where local visitors are appointed. (a)

- *60 Where the king is founder of a charity, his majesty and his successors are *visitors*, and the right of visiting is exercised by the chancellor, upon a petition for that purpose ; (b) but it is not *in the *court of chancery* that the king's visitatorial power is to be exercised, it is by the lord chancellor ; (c) and therefore a solicitor's bill, in respect of proceedings before the chancellor in his visitatorial character, cannot be taxed under the statute, (2 Geo. II. c. 23. s. 22.) it not being a proceeding in *law* or *equity* within the statute. (d)

But wherever a *private person* is founder, such private person and his heirs are, by implication of law, visitors ; and the

(p) *Bishop of Hereford v. Adams*, 7 Ves. 324. ; and see *Attorney General v. Earl of Winchelsea*, 3 Bro. C. C. 373.

(q) *Aylett v. Dodd*, 2 Atk. 238. *Attorney General and Johnson*, AmbL. 190. *Attorney General against Sparkes*, AmbL. 201.

(r) *Attorney General against Tonna*, 4 Bro. C. C. 103. S. C. 2 Ves. jun. p. 4. ; and see S. P. *Ex parte Jortin*, 7 Ves. 340.

(s) *Attorney General v. Mayor of Coventry*, 2 Vern. 400.

(a) *Attorney General v. Price*, 3 Atk. 108. ; and see *Attorney General v. Myddleton*, 2 Ves. 329. *Attorney General v. Corporation of Bedford*, 2 Ves. 505.

(b) *Attorney General v. Black*, 11 Ves. 193.

(c) *Ex parte Dann*, 9 Ves. 548.

(d) *Ib.* 547.

founder may vest such *visitation* right in any other person, or his heirs; (e) nor are any particular words required, to create a *visitor*. It is sufficient if the intention of the founder appears who should be *visitor*, technical words not being necessary. (f.)

If the charity is not vested in the persons who are to partake, but in trustees for their benefit, no *visitor* arises by implication, but the trustees have that power. (g)

Another person may graft upon a former charity, and, by express words or necessary implication, subject the estate or emolument given by him to the same *visitation* power, and to be governed by the same rules. (h)

The founder may give a general power, or may limit and bind by particular statutes and laws; may give the *visitor* a power of altering or giving new statutes; or may restrain from doing it, or *from acting according to any other. If the power to the *visitor* is unlimited and universal, he has, in respect of the foundation and property moving from the founder, no rule but his own discretion. If there are particular statutes, they are his rule, he is bound by them; and if he acts contrary to, or exceeds them, he acts without jurisdiction. (i).

*61

No court of law or equity can anticipate the judgment of the *visitor*, or take away his jurisdiction; but his determination is final and conclusive, and it is convenient that it should be so; for this method of determination of controversies is at home, *forum domesticum*, and final in the first instance; *secundum arbitrium boni viri*. It is true this power may be abused; but if it is exercised in a discreet manner (as it generally is) it is a much less expense than suits at law or in equity, (k) and ought to be supported, (l) but being summary and arbitrary, ought not to be extended. (m) Local *visitors* do not visit but from three years to three years; but they may, if they please, hear complaints within that time. (n).

(e) Eden v. Foster, 2 P. Wms. 325.;
and see Attorney General v. Price, 3
Atk. 108.

(f) See 3 Atk. 662. Attorney General v. Middleton, 2 Ves. 328.

(g) 1 Ves. 472.

(h) Id. 472, 3.

(i) Green, and Rutherford, 1 Ves.
472.

(k) Attorney General v. Talbot, 3
Atk. 662. S. C. 1 Ves. 78.

(l) 1 Ves. 476.

(m) 2 Ves. 328.

(n) Attorney General v. Price, 3
Atk. 108.

In those cases where the governors, or *visitors*, are said *not to be accountable*, it must be intended, where such governors have the *power of government only*, and not where they have the *legal estate*, and are *intrusted with the receipt of the rents and profits*; in respect of which it is established, they are to be considered as *trustees*, and are accountable for a breach of trust.⁽ⁿ⁾

*62

Corporations for charitable purposes are considered as *trustees*,^(o) and if by conveyances they have abused the trust, such alienation, though good at law, is bad in equity, and the alienee will be considered as a trustee. But, it seems, this doctrine does not extend to corporations holding for purposes not charitable; for corporations in such cases are not considered as trustees.^(p)

a*

Where one seized of a manor granted a rent in fee out of it, as a charity, for the support of several poor persons, and he afterwards granted the manor to J. S. in fee, the nomination of the poor persons was held to belong to the heir of the grantor, and did not go with the manor.^(q) So, if a man founds a charity for almshouses, the founder and his heirs have a right of nomination; but it may be forfeited by a corrupt or improper nomination of such as are not fit objects of the charity, or by making no nomination at all, provided the founder, &c. has had notice of the vacancy.^(r)

*63

Where there is a bequest to *trustees* for charitable purposes, the court of chancery upon an information administers the trust, and a scheme, for that purpose, is laid before the master; but where the testator's object is charity, and *no trust is interposed*, the trust is then administered by *sign manual*.^(s)

(n) *Eden v. Foster*, 2 P. Wms. 326. and vid. case of the Hospital of Sutton Coldfield, Duke Char. Uses, p. 684., and *Hynshaw and Pydwers v. Mayor and Corporation of Morpeth*, Duke, p. 69. *Attorney General v. Lock*, 2 Atk. 165. *Attorney General v. Foundling Hospital*, 2 Ves. jun. 47. S. C. 4 Bro. C. C. p. 167.

(o) *Lydiat v. Sir John Foach*, 2 Vern. 412. *Attorney General v. Corporation of Bedford*, 2 Ves. 505.

(p) Vid. *The Mayor of Colchester v. Lowten*, 1 Ves. and Bea. 246.

(q) *Attorney General v. Rigby*, 3 P. Wms. 146.

(r) *Attorney General v. Leigh*, 3 P. Wms. 146. note a.

(s) *Paice v. The Archbishop of Canterbury*, 14 Ves. 372. and *Moggridge and Thackwell*, 7 Ves. 36. 86.; see also *Attorney General against Herrick*, Amb. 712.; and see *Attorney General v. Pearce*, 2 Atk. 87. *Cook v. Duckenfield*, 2 Atk. 569.; and see 2 Freem. 261. In *Cox v. Bassett*, 3 Ves. 155., a legacy for a general charity purpose was held void, as being undefined.

Where a residue is to be applied, the court frequently directs a scheme, even where an unlimited discretion, as to distribution, is left to a trustee, and where consequently a scheme can answer no purpose, but to show that the whole fund is applied to the proper objects ;(t) but where part of an annual and temporary income is to be disposed of from year to year, according to a discretion to be exercised every year, and possibly every day, a scheme is not directed, but parties are left at liberty to apply to the court in case of any misapplication.(u)

The only way of administering a charity is under general directions to trustees : and in case of misbehaviour there must be another information upon the new ground, for the court will not keep the information under the direction of the court, to be executed from time to time.(v)

*In a case where a corporation who were trustees of a freehold estate for the benefit of a charity, had misapplied the increased revenues, and grossly misbehaved themselves in the execution of their trust, and were unable to pay the sums due from them in consequence of their misapplication and misbehaviour, the court directed the trust estate to be conveyed to persons more able and willing to execute the trust faithfully, for the benefit of the poor.(w) *64

But though corporations constituted trustees may be divested of their trust for an abuse of it, yet the court cannot divest them of their corporate character and capacity ; that, it seems, can only be done on a petition to the chancellor in his visitatorial capacity.(x)

A court of equity has no jurisdiction with regard either to the election or the amotion of corporators of any description.(y)

We shall now treat of the principles laid down in respect of interest upon legacies.

(t) Waldo v. Caley, 16 Ves. 211.

(u) Ib. and see Supple against Lowson, Amb. 729.

(v) Attorney General v. Haberdashers' Company, 1 Ves. jun. 295. ; but see Attorney General v. Harrow School, 2 Ves. 552., where information was not dismissed, in order to keep a hand over the parties.

(w) Mayor, Bailiffs, and Commonalty of the city of Coventry and Attorney General, 7 Bro. P. C. 235. Toml. edit.

(x) Attorney General v. Earl of Charendon, 17 Ves. 499.

(y) Ib. 498.

Specific legacies never carry interest,(a) though they vest immediately upon the death of the testator.(b)

- *65 Where any particular rate of interest is directed by a will, the court, of course, gives that ; *and formerly, where a legacy charged on personal estate was given generally, with interest, the court allowed the full legal interest.(c) So, if the legacy was charged upon the *real estate*, the rule of the court formerly was, to give one per cent. less than the legal interest ;(d) but latterly, the court appears to have made no such distinction, and whether the charge be on real or personal estate, four per cent. only has been given.(e)

It seems to be a rule that where no interest on legacies is given by the will, (unless in the case of an infant having a right to demand maintenance from the testator,(f) of which more hereafter,) it is only to be allowed at the rate of 4l. per cent. from the end of the year, after the testator's death,(g) and this, though it may appear to have produced, within the year, interest at five per cent. ;(h) as money in the funds.(i) The remaining interest goes to the executor.(k) In one case, it is said, that where a *legacy* is given to a *charity*, interest shall be paid from the death of the testator ;(l) but the report is not warranted by the register's book.(m)

- *66 *This rule in particular cases sometimes operates inequitably ; but with a view to general convenience, it has been adopted.(n) In some former cases, the amount of the interest given

(a) See *Apriece v. Apriece*, 1 Ves. and Bea. 384. ; but see *Barrington v. Tristram*, 6 Ves. 345.

(b) *Kirby v. Potter*, 4 Ves. 175.

(c) *Moore v. Moore*, 3 Atk. 402. *Beckford and Tobin*, 1 Ves. 311.

(d) *Ib. Bryant v. Speke*, 1 Ves. 171. *Trimblestown v. Colt*, 1 Ves. 278.

(e) *Treves v. Townshend*, 1 Bro. C. C. 384. *Sitwell v. Bernard*, 6 Ves. 543.

(f) *Tyrell v. Tyrell*, 4 Ves. 5.

(g) *Maxwell v. Wettenhall*, 2 P. Wms. 25. *Guillam v. Holland*, 2 P. Wms. 343. *Lloyd v. Williams*, 2 Atk. 109. *Pearson v. Pearson*, 1 Sch. and

Lefroy, 11. *Coleman v. Seymour*, 1 Ves. 211. *Beckford v. Tobin*, 1 Ves. 310. In this case it is said the rule of the court is to give 5 per cent. interest, see p. 311.

(h) *Sitwell v. Bernard*, 6 Ves. 540. contra, *Maxwell v. Wettenhall*, 2 P. Wms. 27.

(i) *Gibson v. Bott*, 7 Ves. 97.

(k) *Pearson v. Pearson*, 1 Sch. and Lefr. 12.

(l) 1 Atk. 356.

(m) See Mr. Sander's note to that case.

(n) 6 Ves. 540.

was made to depend upon the productiveness of the fund,(o) or the contrary; but this doctrine is exploded,(p) the rule being now in all cases the same.(q)

The same rule is applied to cases where the debts cannot be arranged for ten years, and where there are no debts, and the property is immediately tangible in the funds.(r)

But though it is generally true, that (following the rule in the ecclesiastical court)(s) an executor is not bound to pay debts or legacies before the end of the year, because he cannot know, until then, what fund there is to pay,(t) yet this is only adopted for convenience; and if, in any case, it is quite clear that there are no debts, the court will distribute the fund, before the end of the twelve months.(u)

Where the court decrees a legacy to be a satisfaction of a debt, the court gives interest always from the death of the testator.(v)

If a legacy be given, charged upon a *dry reversion*, it carries interest only from a year after the death of the testator, a year being a convenient *time for a sale.(w) In the same case it was held, that if a legacy be given of a personal estate, consisting of mortgages, carrying interest, or of stocks yielding profits half yearly, in such case the legacy would carry interest from the death of the testator;(x) but that, as we have seen, is not now the rule. *67

If a legacy be brought into court, and the legatee has notice of it, so that it is his fault not to pray to have the money, or that the money should be put out, the legatee, in such case, loses the interest from the time the money was brought into court; but if the money was put out, the legatee is allowed the interest which the money yields.(y)

Where a legacy is to be raised out of an estate devised for

(o) This seems hinted at in *Malcolm against Martin*, 3 Bro. C. C. 54., and in *Bourke v. Ricketts*, 10 Ves. 333.; and see *Raymond v. Broadbent*, 5 Ves. 13. 199.

(p) *Gibson v. Doll*, 7 Ves. 97. 1 Sch. and Lefr. p. 11.

(q) See *Garthshore v. Charlie*, 10 Ves. 13.

(r) *Gibson and Bott*, 7 Ves. 59.

(s) 1 Sch. and Lefr. p. 11.

(t) See 1 Ves. 310.

(u) *Garthshore v. Charlie*, 10 Ves.

13.

(v) *Clarke and Sewell*, 3 Atk. 88.

(w) *Maxwell v. Wettenthal*, 2 P. Wms. 26.

(x) *Ib.*

(y) *Ib.*

time; but in either of these bequests, where they are given to children, the court will direct interest for their portions immediately; (s) for in regard to children, the rule seems to be, that if a legacy be given to a *legitimate child*, (it is different as to a *natural child*), (t) payable upon a contingency, (u) or certainly, at a future day, and the child has no other provision, (v) nor any maintenance allotted by the will giving the legacy, (w) *it will carry interest, though interest is not mentioned, (x) on account of the imbecility of the child, (y) and the obligation attaching upon the person who gives it, and because it is in the nature of a portion. A *residue* payable at a future time, (z) forms an exception to the general rule, that a legacy, payable at any given time whatever, does not carry interest till that time, whether it be a vested interest or not, unless something is said in the will, that shows the testator's intention to give interest in the mean time. (a)

A contingent legacy given to a *grandchild* does not carry interest; (b) and it has been held, that a legacy bequeathed to a *niece*, payable at a future day, does not carry interest before the time of payment. (c) Nor does a legacy from a *husband* to a *wife*, payable at a future day, carry interest, (d) though Lord

(s) Incledon v. Northcote, 3 Atk. 438.; and see Fonerau v. Fonerau, 3 Atk. 646.

(t) Beckford and Tobin, 1 Ves. 300. Ellis v. Ellis, 1 Sch. and Lefr. 47.; and see Perry and Whitehead, 6 Ves. 547.

(u) It seems from Glyde v. Wright, 1 Ch. Rep. 265. Rennessay v. Parrot, 1 Ch. Cas. 249. and Leech v. Leech, 1b. that interest was not formerly allowed on a contingent legacy to a child.

(v) See Long v. Long, 3 Ves. 286. in note, Mitchell and Bower, 3 Ves. 287, 8.

(w) 3 Atk. 716. S. C. 1 Ves. 428.

(x) Harvey v. Harvey, 2 P. Wms. 21. Green v. Belchier, 1 Atk. 506. Heath v. Perry, 3 Atk. 102. Coleman v. Seymour, 1 Ves. 211. Chambers v. Goldwin, 11 Ves. 2. Carey v. Askew, 2 Bro. C. C. 58. Incledon v. Northcote, 3 Atk. 438. Ellis v. Ellis, 1 Sch. and Lefr. 5. Mole v. Mole, 1 Dick. 311.

(y) 15 Ves. 304.

(z) Sisson v. Shaw, 9 Ves. 289.; and see Tyrell v. Tyrell, 4 Ves. p. 5. Nichols v. Osborn, 2 P. Wms. 421. and note 1. by Mr. Cox.

(a) Heath v. Perry, 3 Atk. 102.

(b) Haughton v. Harrison, 2 Atk. 330. Butler v. Butler, 3 Atk. 59. Elton v. Elton, 3 Atk. 506. Perry v. Whitehead, 6 Ves. 546, 7. Errington v. Chapman, 12 Ves. 23.; but see Taylor v. Johnson, 2 P. Wms. 504. where interest was given, and what is said in Ellis v. Ellis, 1 Sch. and Lefr. p. 5.; but these cases seem to have proceeded upon an implication appearing on the will, that interest should be given.

(c) Crickett v. Dolby, 3 Ves. 10.; and see Palmer v. Mason, 1 Atk. 695.

(d) See Stant v. Robinson, 12 Ves. 461. S. C. M. S. Lowndes v. Lowndes, 15 Ves. 301.

Alvanley seems *to have confidently thought it would.(c) In one case, where the legatee was a *cousin* of the testator, interest was allowed from the testatrix's death;(f) but that case does not appear to have been followed.

With respect to the *necessities* of legatees inducing the court to give interest, it has been held, that if one *not a parent*, gives a legacy to an infant, payable at twenty-one, without any devise over; and the infant has nothing else to subsist on, the court will order part of this legacy, in order to provide bread for the infant, to be paid presently, allowing interest for the same to the person paying it, out of the remaining principal; but this is done very sparingly.(g)

Accumulative Legacies.

The doctrine as to *accumulative legacies* (professedly borrowed from the civil law) seems to be, that where the same *specific* thing is given *twice*, or where, in *the same will*, a like sum or *quantity* is given,(h) for the same cause, in the same act, and *totidem verbis*, or only with a small difference, a single; and not a double and accumulative legacy passes; but, in general, if *equal*,(i) **greater*,(k) or *less*(l) sums, be given in one will,(m) or by two distinct writings of different dates,(n) as by a will and a codicil, or two codicils, this is an augmentation, and the legatee takes a double or accumulative legacy;(o) but though *simpliciter* and *prima facie*, two different instruments giving legacies, whe-

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(c) *Crickett v. Dolby*, 3 Ves. 16.; and see *Carey v. Askew*, 3 Bro. C. C. 69.

(f) *Pitt v. Fellows*, Mich. 8 Geo. II. 1733. MS.

(g) *Harvey v. Harvey*, 2 P. Wms. 23.

(h) *Duke of St. Albans v. Beauchamp*, 2 Atk. 636. Vid. *Holford v. Wood*, 4 Ves. 90. *Garth v. Meyrick*, 1 Bro. C. C. 30.

(i) As to equal legacies, see *Hodges v. Peacock*, 3 Ves. 734. Dig. 22. T. 3. b. 12.

(k) As to greater, see *Masters and Masters*, 1 P. Wms. 424. *Curry against Pile*, 2 Bro. C. C. 225.

(l) *Payne v. Payne*, Ch. Cas. 301.; but see 2 Atk. 638.

(m) 2 Atk. 638.

(n) See *Allen v. Callow*, 3 Ves. 294.

(o) See *Masters v. Masters*, 1 P. Wms. 423., and *Mooley v. Hutton*, 1 Bro. C. C. 390. in note, and in particular Mr. Just. Aston's argument, which, says Lord Thurlow, in *Ridges against Morrison*, "contains the whole doctrine of the law upon the subject." 1 Bro. C. C. 390, 1. In this latter case, the reporter does not seem accurately to have expressed what Lord Thurlow says in that part of his judgment where he expresses the rule as laid down by Mr. J. Aston; and see what is said by the master of the rolls in *Beayn v. Benyon*, 17 Ves. 42.

ther of the same or of a larger amount, will be held accumulative and not a substitution; (p) yet the rule does not hold, if there appears upon the face of the instrument an intention of the testator to the contrary. (q)

The court, however, presumes against double portions, (r) and small circumstances will raise an inference against them. (s)

*74 If the legacy be expressed to be, or appears to be given in each writing, *for the same cause*, (t) it is considered as repetition, and not addition; (u) but where one legacy is given generally, and the other for an *express cause*, the legatee, it has been held, takes both. (v)

If a testator by will gives 2,000*l.* a year by way of jointure to any woman he might marry, and after marriage, by a codicil, gives his wife the same jointure, she cannot claim both. (w)

The court presumes against double portions, (x) and small circumstances will raise an inference against them; (y) but it seems doubtful whether evidence from *declarations of the testator* is admissible to prove that the legacy was not intended to be accumulative: (z) and in all cases, the *onus* of making out proof lies upon the executor, and not upon the legatees. (a)

Substituted and added legacies are, it seems, raiseable out of the same fund, and subject to the same conditions, as the legacies substituted for, or added to. (b)

Ademption of Legacies.

In regard to *ademptions*, it has been laid down, that an *alienation* by a testator, of the subject of a legacy, if there is nothing else in the case, is an *ademption*, and equity will not set it up again. (c)

(p) *Barclay v. Wainwright*, 3 Ves. 465. (u) *Benyon v. Benyon*, 17 Ves. 43.

(q) As it did in *Coote v. Boyd*, 2 Bea. 521., and in *Barclay v. Wainwright*, 3 Ves. 462.; and see *Moggridge v. Thackwell*, 1 Ves. jun. 472. S. C. 3 Bro. C. C. 527. *Allea v. Callow*, 3 Ves. 289. (v) *Ridges and Morrison*, 1 Bro. 393.

(r) *Osborne v. Duke of Leeds*, 5 Ves. 381. (w) *Osborne v. Duke of Leeds*, 5 Ves. 381.

(s) *Ib.* 384.

(t) *Ib.* 380.

(a) See *Roper on Legacies*, 2 vol. p. 409., and cases there cited.

(b) *Growder v. Clowes*, 2 Ves. jun. 450.

(c) *Hambling v. Liater*, Ambl. 402.

*It was the doctrine of Lord King, (d) Lord Hardwicke, (e) and of Lord Hardwicke, (f) and others, (g) that if a particular debt, or part thereof, was bequeathed, and the same was recovered by the testator in his lifetime, in an *adversary* way, that would amount to an ademption of the legacy; but, that if the debt was *voluntarily* paid in, the legacy would not be adeemed; but this distinction between a *compulsory*, and a *voluntary* payment, appears to have been since exploded. It seems to be very clearly established, that the receiving a debt does not adeem a legacy, (h) (except where the legacy of the debt is to the debtor, (i)) although it is open to the observation, that if a debt bequeathed, and afterwards received, can be demanded, the *specific* legacy is converted into a *pecuniary* legacy. (k)

In a case where the testator had received dividends under a bankruptcy upon a debt previously bequeathed, this was helden not to adeem the legacy. (l)

The doctrine, that the calling in of a debt operates *as an ademption, has not been approved, because the testator might call in the debt, fearing it might be lost and not liking the security; (m) and in a subsequent case Lord Hardwicke qualified his general doctrine, by saying that a *compulsory* payment may, or may not adeem the legacy, according to the circumstances with which it is accompanied, (n) and that evidence may be adduced to show, *quo animo*, the debt was called in. (o) The master of the rolls (Sir Thomas Clarke) observes, "a debt given specifically, and called in, and no account appears why it was called in, is an ademption. It is the intent that governs. It was so in

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- (d) Rider and Wager, 2 P. Wms. 330.
- (e) Partridge v. Partridge, For. 228.
- (f) Lawson v. Stitch, 1 Atk. 508.
- (g) Crockett v. Crockett, 2 P. Wms. 106. Amb. 402.
- (h) Orme v. Smith, 1 Eq. Abr. 302. S. C. 2 Ves. 661. Gibb. Rep. 82. Ashton v. Ashton, 3 P. Wms. 323. Jeffreys v. Jeffreys, 3 Atk. 122. Drinkwater v. Falconer, 2 Ves. 624; Ashburner against M'Guire, 2 Bro. C. C. 110. Stanley v. Potter, mentioned 4 Ves. 559.; but see Badrick v. Stevens, 3 Bro. C. C. 431., and Fryer v. Morris, 9 Ves. 363.
- (i) Rider and Wager, 2 P. Wms. 331.
- (k) Fryer v. Morris, 9 Ves. 363.; and see Rider v. Wager, 2 P. Wms. 330.
- (l) Ashburner v. M'Guire, 2 Bro. C. C. 108.
- (m) Earl of Desmond v. Earl of Suffolk, 1 P. Wms. 464.; and see Ford v. Fleming, 2 P. Wms. 469; Poulet's case Raym. 335. Swind. 548. 6th edit.
- (n) See Hambling v. Lister, Amb. 401.; and see Fryer v. Morris, 9 Ves. 360. a case of that kind.
- (o) Drinkwater v. Falconer, 1 Ves. 624.

the *Roman law*-(p) I do not go so far as Lord Talbot did in *Ashton and Ashton*, and say, that the calling in a debt by the testator is not an ademption, because it *might* be from an apprehension of such debt being in danger; but if there is proof that it was called in for any other reason than from an intention to adeem, I think it is not an ademption.”(q)

*77 If the intention appears to be to give a pecuniary legacy, secured on certain funds, such as *mortgages, bonds, or notes*, and the securities are *afterwards discharged, *voluntarily or compulsorily*, the legacy, it seems, is not adeemed.(r)

So, if a legacy be given to J. S. to be paid out of such a particular debt, and the debt is paid in,(s) or there is no such debt, or the fund fails, still the legacy must be paid, and the failing of the *modus* appointed for payment will not defeat the legacy.(t)

If there be a legacy of stock, and after the will the testator sells the stock, it has been questioned whether that amounts to an ademption.(u) It seems, it would not.(v) If, however, he sells *part* of it, it has been considered as an ademption *pro tanto*.(w) If the testator gives part of his stock, and sells out, and, before his death, purchases other stock, this will not be an ademption;(x) but if there be another disposition of the property, it will be an ademption.(y)

Where a legacy is of the “*value*” of securities, &c. there, though the securities be changed, the legacy is not adeemed.(z)

*78 Where a devise is of 400*l.* to be laid out in finishing *a house, and the testator lived to lay out as much himself, but left the

(p) Justin. Inst. 2. §9. 12. is full in point.

(q) *Hambling v. Lister*, Ambl. 402.; and more fully stated from Reg. book by Sir Wm. Grant, master of the rolls, in *Wood v. Penoye*, 13 Ves. 336.

(r) *Crocket v. Crocket*, 8 P. Wms. 164. See *Attorney Gen. against Parkyn*, Ambl. 566. *Ashburner against McGuire*, 2 Bro. C. C. 108.

(s) See 8 P. Wms. 329, 330.

(t) *Saville v. Blackett*, 1 P. Wms. 779.

(u) *Avelyn v. Ward*, 1 Ves. 428.;

and see *Simmons v. Vallance*, 4 Bro. C. C. 38.

(v) See *Bronsdon against Winter*, Ambl. 57.; but see *For. 227*.

(w) *Jeffreys v. Jeffreys*, 3 Atk. 120.; and see *Partridge v. Partridge*, *For. 227*.

(x) *Partridge v. Partridge*, *For. 226*. *Avelyn and Ward*, 1 Ves. 426. *Drinkwater and Falconer*, 2 Ves. 625.

(y) *Drinkwater v. Falconer*, 2 Ves. 623.

(z) *Paleford v. Hunter*, 3 Bro. C. C. 416.

house unfinished, the 400*l.* was by arrangement ordered to be paid, and was not considered as adeemed. (a)

If there be a bequest of goods, &c. specified to be in a particular place, as in the testator's house at B., they must be there at his death, in order to give effect to the legacy; for if they are removed before that period, unless the removal be owing to accident, (b) or the convenience of the party, (c) it will be presumed the testator had altered his intention, and meant to adeem the bequest. (d)

The cases wherein ademption has been allowed, are, principally, where a testator gives a legacy for one particular purpose only, and after that applies a sum of money to the same purpose. (e)

Where a legacy is given to a child, it is deemed a portion, and therefore is supposed to be the result of a deliberate distribution among the testator's children. Crediting the testator for that deliberation, if he advances in his life that sum which he has adjudged to be the due and proper portion for that child, the presumption of law is, that he has satisfied that intent, and, consequently, that it is no longer a ground for any farther demand. (f)

*It is, therefore, a constant rule, and long recognised, (g) that *79 where a parent, or a person *in loco parentis*, (h) (for it is otherwise in the case of a stranger, (i) or collateral relation, (k) and a father is considered as a stranger to his natural child;) (l) gives a legacy as a portion, and afterwards, upon marriage, or any other occasion calling for it, advances presently and not contin-

(a) *Husbands v. Husbands*, 1 Vern. 95, S. C. 2 Ch. Cas. 187.

(b) See *Rep. on Legacies*, 1 vol. 34.

(c) *Land v. Devaynes*, 4 Bro. C. C. 537.; but see *Shaftesbury v. Shaftesbury*, 2 Vern. 747.

(d) *Green v. Symonds*, 1 Bro. C. C. 34.

(e) See *Roome v. Roome*, 3 Atk. 183.

(f) *Ellison v. Cookson*, 1 Ves. jun. 108.; and see *Green and Smith*, 1 Atk. 573. *Shudal v. Jekyll*, 2 Atk. 518.

Rosewell v. Bennett, 3 Atk. 77. Ex parte *Pye*, 18 Ves. 151. 158.

(g) See *Irod and Hurst*, 2 Freem. 224.

(h) *Shudal v. Jekyll*, 2 Atk. 516. *Grave against Lord Salisbury*, 1 Bro. C. C. 426, 7. *Monk v. Lord Monk*, 1 Ball and Beatty, 298.

(i) See *Hartop v. Whitmore*, 1 P. Wms. 491. S. C. *Prac.* Ch. 541. *Powell and Cleaver*, 2 Bro. C. C. 499.; but see the case put, 2 Atk. 518.

(k) *Shudal v. Jekyll*, 2 Atk. 516.

(l) Ex parte *Pye*, 18 Ves. 147, &c.

gently, (m) in the nature of a portion to that child (for there must be a resemblance between the two provisions), (n) such advance, though less than the amount of the legacy, (o) and *a fortiori* if more, (p) or equal, (q) will amount to an ademption of the gift by the will, and a court of equity will presume he meant to satisfy the one by the other. (r) In such cases, slight circumstances of difference are not regarded, (s) as they are, in respect to the performance and satisfaction of a covenant. (t) But evidence is admissible to *repel the presumption*; (u) and if, in the case of a portion given by a parent, there be any thing to show that the

*80 portion was paid without *an intention to adsem, the mere payment will not amount to an ademption. (v)

So, in the case of a portion given by a stranger, evidence may be adduced to show that such stranger considered himself as standing *in loco parentis*. (w)

Parol declarations of a testator, both *previous* and *subsequent* to the gift, are admitted; (x) and any demonstration from the conduct and language of the author of both gifts is admissible, to show that he considered the gift by the will as still a subsisting benefit. (y) On the other hand, evidence may be adduced to show that an ademption was intended. (z) If the evidence be conflicting, and such as leaves the intention doubtful, the legal presumption will prevail. (a)

And it is observable, that the presumption in these cases, though it may be rebutted by evidence, is considered as a *presumption of law*; and is therefore never sent for the consideration

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| (m) <i>Spinks v. Robins</i> , 2 Atk. 491. | (v) <i>Debere v. Mann</i> , 2 Bro. C. C. 185. 519. |
| (n) <i>Powell v. Cleaver</i> , 2 Bro. C. C. 517, 518. | (w) <i>Ex parte Fye</i> , 19 Ves. 163; 4. |
| (o) <i>Hartop v. Whitmore</i> , 1 P. Wms. 681. | (x) <i>Vid. Trimmer v. Bayne</i> , 7 Ves. 518; but see <i>Mascul v. Mascul</i> , 1 Ves. 324. where Lord Hardwicke says no regard is to be paid to declarations not at the time of making the will. |
| (p) <i>Rosewell v. Bennett</i> , 3 Atk. 77. | (y) <i>Ellison v. Cookson</i> , 1 Ves. jun. 188. |
| (q) 2 Vern. 484. | (z) <i>Rosewell v. Bennett</i> , 3 Atk. 78. |
| (r) <i>Biggleston v. Grah</i> , 3 Atk. 48. | <i>Meech v. Lord Monk</i> , 1 Ball and Beatty, 306. |
| (s) <i>Trimmer v. Bayne</i> , 7 Ves. 515. | (a) <i>Dwyer v. Lysaght</i> , 2 Ball and Beatty, 156. |
| S. C. 3 Bro. 61. | |
| (t) As to the satisfaction of covenants, see <i>Trimmer v. Bayne</i> , 7 Ves. 515. | |
| (u) <i>Hartopp v. Hartopp</i> , 19 Ves. 104. | |
| (v) <i>Ellison and Cookson</i> , 2 Bro. C. C. 300. | |
| <i>Blishhorn v. Feast</i> , 3 Ves. Sen. 27. 2 Atk. 518, 492. | |

of a jury. (s). Whether evidence ought to have been admitted originally has been doubted. Lord Kenyon seems to have approved of it in *Ellison and Gorton*; but Lord Thurlow, when the case came before him, seems to have disapproved of it, (t) and Lord Eldon said: "he would say nothing about it." (u)

It seems, however, that, to be a satisfaction, the thing given must be ejusdem generis with the legacy; where, therefore, a father gave 500*l.* to his son by will, and afterwards took him into partnership, the stock, amounting to 3,000*l.*, was held not to be a satisfaction of the legacy. (d)

*81

We shall now observe upon the cases in regard to *residuary bequests*, and those where the executor is entitled to the residue, and on the *abatement of legacies*.

A residuary bequest of *personal* estate, (it is otherwise as to *real*), (a) carries not only every thing not disposed of, but every thing that in the event turns out not to be disposed of, (b) whether by revocation of the will, (c) by lapse, (d) or by a gift being void, (e) or not sufficiently disposed of, (f) or given on a contingency which does not happen, (g) or otherwise. In case of the lapse of real estate, the heir at law takes; but in the case of personal property, the *residuary legatee* is preferred either to the next of kin, or the executor; (h) but where the intention of the testator is to devise the residue, exclusive of a part given away, the residuary devisee will not take that part, in any event (i) but the words in a residuary bequest, "not herein before specifically disposed of," have been held to mean only,

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(a) *Ellison v. Cookson*, 3 Bro. C. C. 63. *Trimmer v. Bayne*, 7 Ves. 515.

(b) See 1 Ves. jun. 109, 110.

(c) See *Trimmer v. Bayne*, 7 Ves. 515.

(d) 1 Bro. C. C. 555; and see *Guise against Earl of Salisbury*, 1 Bro. C. C. 435.

(e) *Ambl.* 590. *Darour v. Motteux*, 1 Ves. 322.

(f) *Cambridge v. Ross*, 8 Ves. 25; and see *Green v. Elkins*, 2 Atk. 475. *Windham v. Windham*, 3 Bro. C. C. 58. *Shaw against Cunliffe*, 4 Bro. C. C. 152.

(c) See *Humphrey v. Tayleur*, *Ambl.* 138.

(d) *Cambridge v. Ross*, 8 Ves. 25. *Wright v. Hall*, Fort. 192. contra, *Sprigg v. Sprigg*, 2 Vern. 394.

(e) *Darour v. Motteux*, 1 Ves. 320. *Shadley v. Baker*, 4 Ves. 522; but see *Baker v. Hall*, 12 Ves. 491.

(f) *Browne v. Higgs*, 4 Ves. 708.

(g) *Bird v. Leveson*, 15 Ves. 509.

(h) 2 Ves. 25.

(i) *Gravecroft against Hallam*, *Ambl.* 845; and see *Davies v. Davies*, 3 P. Wms. 40. *Attorney General v. Johnston*, *Ambl.* 577.

is not particularly disposed of,^(k) and not to exclude the residuary legatee from a lapsed specific legacy.^(l)

If a prize be taken, and a captor makes his will and dies, and afterwards, upon condemnation of the ship, the crown makes a grant of the prize, it goes to the representatives of the deceased, subject to his will, like his other property;^(l) and as if it had been actually a part of his property at the time of his death.

A devise of a residue of personal estate to three is a joint devise, and survives.^(m) So, if A. makes two executors, B. and C. and appoints them residuary legatees, and B. dies, the whole survives to C.⁽ⁿ⁾

If a legacy be given to two, and one dies before any severance of the joint tenancy, the legacy survives;^(p) but if a legacy be given to several tenants in common, as if a residue be given to six persons, to each of them a sixth part, and one dies in the testator's lifetime, it will be a lapsed legacy as to one sixth.^(q)

Wherever, indeed, there are words plainly importing a tenancy in common, such construction will be put upon other inconsistent words, that will, if possible, not defeat and destroy the effect of the other words importing a tenancy in common.^(r)

A simple bequest of a legacy or a residue of personal property to A. and B. without more, is a joint tenancy, whether they are executors or not; and it is upon the other side to show, from some part of the context of the will applying to that bequest, that the words are not to have their legal operation.^(s) The court inclines as much as possible to construe words as

(k) Roberts v. Cook, 16 Ves. 451.

(l) Stevens v. Dagwell, 15 Ves. p. 139.

(m) Webster v. Webster, 2 P. Wms. 347.; and see Lady Shore v. Billingsley, 1 Vern. 482. Thomas Jones' Rep. 162.

(n) Cray v. Willis, 2 P. Wms. 529.

(p) Page v. Page, 2 P. Wms. 429. Cray v. Willis, 2 P. Wms. 529. Shore v. Billingsley, 1 Vern. 482. Cox v. Quantock, 1 Ch. Cas. 297. 2 Ch. Cas. 64.

(q) Page v. Page, 2 P. Wms. 484 S. C. Mos. 42. 2 Str. 370.

(r) Russell v. Long, 4 Ves. 554. See Lord Bindon v. Earl of Suffolk, 1 P. Wms. 98. Stanger v. Phillips, 1 Eq. Cas. Abr. 292. 3. and the words of the decree, 1 P. Wms. 97. n. 1. See what is said of Suffolk and Bindon, 1 Full. and Bos. N. S. p. 90.

(s) Crooke v. De Vandes, 9 Ves. 294. Campbell v. Campbell, 4 Bro. C. C. 15.

making a tenancy in common, (d) and the words "to and amongst," or "amongst" only, (u) or "respectively," (v) are held to make a tenancy in common.

The cases are very numerous on questions relating to the right of the executor to the residue. Lord Hardwicke thought it impossible to reconcile all the cases, the contrariety being so great, (w). Distinctions have been heaped on distinctions, (x) and case upon case, until it is not easy to say upon what foundation the doctrine stands, (y). Lord King lamented the uncertainty of the law on this subject, (z) and brought in a bill to settle the matter, which did not fail on any particular reason, but, unfortunately, there was a difference between the two houses, and this was thrown out by way of reprisal, (a).

*84

By the common law the appointment of an executor vests in him all the personal estate of the testator, as *hæres testamentarius*, to use the expression of the civil law, or, in other words, "as heir of the personal estate;" (b) or, as Sir John Strange terms it, "a legal residuary legatee;" (c) and if any part, after payment of the funeral expenses and debts, is undisposed of by the will, it remains with the executor for his own benefit, except in the case of a *lapsed legacy*, (unless the legacy be to one of two executors,) (d) which, though by law it vests in the executor, yet, in equity, he is held a trustee for the next of kin, (e). The appointment of more than one executor, unless they are expressly made *tenants in common* of the residue, (f) gives them a *joint interest* in the residue, (g) which, if not severed, (as it may be by slight acts indicative of an intention to sever,) (h) will survive. (i).

*85

(f) *Campbell v. Campbell*, 4 Bro. C.

C. 17.

(u) *Ib.*

(v) *Heath v. Heath*, 2 Atk. 121.

(w) 2 Atk. 45.

(x) *Horsby and Finch*, 4 Bro. C. C.

251.

(y) See *King v. Donnan*, 1 Ves. and Bea. 273.

(z) 2 P. Wms. 340.

(a) *Wilson v. Ivat*, 2 Ves. 166.

(b) *Glennell v. Lewthwaite*, 2 Ves. jun. 648.

(c) *Wilson v. Ivat*, 2 Ves. 166.

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(d) *Ibid.*

(e) *Foster and Muht*, 2 Vern. 473.

Owen v. Owen, 1 Atk. 496. *Bishop of Cloyne and Young*, 2 Ves. 91.

(f) As in *Pitt against Benyon*, 1 Bro.

C. C. 589.

(g) *Frewen v. Relfe*, 2 Bro. C. C.

226.

(h) See *Crooke and De Vandes*, 11 Ves. 363. *Jackson and Jackson*, 9 Ves. 591; and see on this subject, *Baldwin against Johnson*, 3 Bro. C. C. 465.

(i) In *Draper's case*, 2 Ch. Cas. 64. the lord chancellor expressed his dislike

The common law right of the executor is, however, controlled by decisions in equity; and wherever, from the language of the will, there is *reasonable ground* (k) for supposing that the testator did not intend the executor should take the surplus, he will be considered as a trustee for those on whom the law would cast the surplus in case of an intestacy. (l) If there be any next of kin, they will take the property; if none, the crown takes it. (m) In some of the cases it has been said, there must appear on the face of the will "a strong and violent presumption," (n) a necessary implication (o) in other cases, "an irresistible inference," (p) to disappoint the claim of the executor; but those expressions have been considered as too strong.

*86 If executors are expressly termed in the will, "executors in trust," (q) or if one of the executors takes as a trustee, (r) or if a sole executor has a legacy "for his care," (s) these, or other expressions of the kind, are considered as denoting that only the office of executor was intended; and, therefore, preclude him from taking any beneficial interest.

So, where the testator gives his property in trust, but does not declare the trust, the executor is excluded. (t) But a bequest for such purpose as executors shall in their discretion think proper, does not exclude the executors. (v)

If a trust be expressed, but not sufficiently, or if a trust be

of the decision, that executors should take as joint tenants; but said, "it must be so, since the judges will have it so." See Webster and Webster, 2 P. Wms. 347. Griffiths v. Hamilton, 12 Ves. 298, and 9 Ves. 400.

(k) Dickes v. Lambert, 4 Ves. 729.

(l) Androvin v. Pajblanc, 3 Atk. 299.

(m) Middleton v. Spicer, 1 Bro. C. 201.; and see Barclay v. Russell, 2 Ves. 430, and 1 Black. Rep. 123.

(n) Newstead v. Johnson, 2 Atk. 45. See Crennell v. Lewthwaite, 2 Ves. jun. 471. Pratt and Sladon, 14 Ves. p. 193.

(o) Cloyne and Young, 2 Ves. 96.

(p) Bowker v. Hunter, 1 Bro. C. C. 330.

(q) Bagwell v. Dry, 1 P. Wms. 700. Read v. Snell, 2 Atk. 645. Pratt v. Sladon, 14 Ves. 198.

(r) White and Evans, 4 Ves. 21. Griffiths and Hamilton, 12 Ves. 308.

Milnes v. Slater, 8 Ves. 308. Sadler v. Turner, 8 Ves. 624.

(s) White v. Evans, 4 Ves. 21.

Rachfield v. Careless, 2 P. Wms. 158.

(t) S. C. 9 Mod. 9. Coadell v. Moghan, 2 Vern. 148. Newstead v. Johnson, 2 Atk.

45. and see Bishop of Gloucester v. Young, 2 Ves. 97.

(v) Paice v. Archbishop of Canterbury, 14 Ves. 370, and see 10 Ves.

527.

(w) Ib.

declared that cannot be executed, the next^(w) of kin will take. And it is observable, there may be cases, where, though the executor is named a trustee for *specific particular purposes* mentioned in the will, affecting only *part* of the property, he will still be allowed to take the residue; he not being considered in such cases as a trustee, with regard to the *whole* of the property which he takes as executor.^(x)

*What expressions in a will convert the executor into a trustee, is matter of frequent controversy. *87

Where there was a *residuary clause* in a will, but the name of the residuary legatee was not inserted, the executor was not allowed to take:^(y) and so, where there was a *residuary bequest*, and the legatee died in the lifetime of the testator.^(z) In another case, where the testator made whoever should be the American ambassador his executor, this was considered as showing that it was not an appointment from personal regard, and therefore the residue did not pass.^(a) It would be the same, it seems, if a *partnership* were made executors.^(b)

So, where the testatrix directed her executors should be paid for *journeys and expenses*, this was considered as evidencing an intention that they should be executors in *trust* only.^(c)

A *pecuniary legacy* to a sole executor, however small, (except, perhaps, it be of mourning only)^(d) excludes him from the residue;^(e) unless under *special circumstances*,^(f) as where the legacy is so qualified that it is not inconsistent with *88

(w) See dict. *Morris v. Bishop of Durham*, 16 Ves. 537. 538.

(x) Vid. *Pratt v. Bladen*, 14 Ves. 198. *Dawson v. Clarke*, 15 Ves. 409; and see *Southcote v. Watson*, 3 Atk. 232.

(y) Vid. *Mordaunt and Haasey*, 4 Ves. 117. *Bishop Cloyne and Young*, 2 Ves. 81. *Lord North v. Purdon*, 2 Ves. 495. *Hornsby v. Finch*, 1 Ves. jun. 344; and S. C. 2 Ves. jun. 78; and see *Langham v. Sanford*, 17 Ves. 453; and also *Lord North v. Purdon*, 2 Ves. 495. a similar case.

(z) *Bennet v. Batchelor*, 1 Ves. jun. 63. S. C. 3 Bro. C. C. 28.

(a) *Urquhart v. King*, 7 Ves. 225. approved in *Griffiths v. Hamilton*, 12 Ves. 390; and vid. *Lord North v. Purdon*, 2 Ves. 495.

(b) *De Masar v. Pybus*, 4 Ves. 648.

(c) *Dean against Dalton*, 2 Bro. C. C. 634.

(d) *Wilson v. Ivat*, 2 Ves. 166. *Balford v. Bradford*, 2 Atk. 222.

(e) *Foster v. Munt*, 1 Vern. 473. This is the leading case on that point. *Felt and Smith*, 1 P. Wms. 7.

(f) *Bishop Cloyne and Young*, 2 Ves. 87. *Dicks v. Lambert*, 4 Ves. 729; and see *Lawson v. Lawson*, 7 Bro. P. C. 511.

his taking the legacy. (g) The rule has been supposed to have been originally adopted to prevent fraud (h) but more probably, on the ground that it could not be intended that a person having a *part* given to him, is to take the *whole*. (i) Lord Hardwicke does not seem to have approved of this reason in one case, (k) though he does in others. (l)

In *Hatton v. Hatton*, (m) Lord King observed, "the construction of an executor who had a legacy, being a trustee for the residue of the personal estate, was first made in a case where an old woman had been drawn in, to make a will by one who was not related to her; and to make him executor of the same. And as she had given him a legacy in the will, it was collected she did not intend him the residue, and since that time this doctrine has prevailed. But he thought, according to common sense, the executor standing *loco testatoris*, should have the whole of the personal estate, which the testator had not wholly disposed of; but this point has been settled otherwise, and he would not alter it."

- *89 *So, equal pecuniary legacies to two or more executors, (all the executors named in the will,) excludes them from the surplus; (n) nor does it seem important, whether such legacies to the executors are given by the will creating the residue, or by a subsequent instrument. (o) And the giving a legacy directly to the executor, or in trust for him, is the same, and equally excludes him from the residue; and so, if the residue be given to him for life, he is excluded. (p) It is settled, that legacies to the next of kin do not vary the rule, (q) though Lord King appears to have

(g) *Nourish and Finch*, 4 Bro. C. C. p. 251.

(h) *Kennedy v. Stainsby*, 1 Ves. jun. 66. in note.

(i) *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 213. *King v. Denison*, 1 Ves. and Bea. 277.

(k) *Bishop Cloyne v. Young*, 2 Ves. 77.

(l) *Newstead v. Johnson*, 2 Atk. 46. *Southcote v. Watson*, 3 Atk. 229. *Androvin and Poffblanc*, 3 Atk. 300. *Blinkhorn and Feast*, 2 Ves. 29.

(m) *M. S. Trib.* 6 Geo. II. 1732. S. C. 2 Eq. Abr. 443.

(n) *Foster v. Munt*, 1 Vern. 473. Pe-

tit v. Smith, 1 P. Wms. 6. *May v. Lewin*, mentioned 2 P. Wms. 162. *Nisbet v. Murray*, 5 Ves. 158. *Mucklestone v. Browne*, 6 Ves. 64. *Carey v. Goodings*, 3 Bro. C. C. 110.

(o) *Mucklestone v. Browne*, 6 Ves. 64.

(p) *Newstead v. Johnson*, 2 Atk. 46. (q) *Bishop Cloyne v. Young*, 2 Ves. 91. *Bayley v. Powell*, 2 Vern. 361. S. C. Prec. Ch. 92. *Seley v. Wood*, 10 Ves. 71. and *Griffiths v. Hamilton*, 12 Ves. 310. *Andrew and Clarke*, 2 Ves. 162. *Langham v. Sanford*, 17 Ves. 451.

Duke v. Duchess of Rutland, 2 P.

determined otherwise.(r) If a clause were inserted in the will, declaring an intention to give nothing by the will to the next of kin, such a clause, it seems, would rebut their equity.(s)

If the legacy given to the executor is consistent with the intent that the executor should take the whole, it will not exclude him.(t) If, therefore, a legacy, whether pecuniary or specific, be given to an executor for life, that *does not exclude him, the meaning being supposed to be, to take that particular legacy out of the residue, for the sake of giving him a limited interest.(v) So, where a legacy is given for life or for years, and the residuary interest over to another, the court has said, that is not sufficient to exclude the executor from the surplus; because that might be for the sake of taking out the interest given over.(w) So, where the legacy to the executor is only an exception out of another legacy, it will not exclude him from the residue.(x) In like manner, a legacy to one only of two or more executors,(y) or to two of six executors,(z) does not exclude the executors from the surplus; because a preference, *pro tanto*, may have been designed.

The same rule holds, where several executors have unequal pecuniary legacies,(a) and where unequal legacies are given to some of the executors, and no legacies to others.(b)

A specific legacy (unless it be by way of exception *out of a general gift)(c) will exclude a sole executor;(d) and a gift of a

Wms. 212. Mos. 4. *Davers v. Dawes*, 2 P. Wms. 43.

(r) *Attorney General v. Hooker*, 2 P. Wms. 338.

(s) *Ambf.* 137.

(t) *Bowker v. Hunter*, 1 Bro. C. C. 337.; and see *Hornaby v. Finch*, 2 Ves. 69. *Lawton v. Lawson*, 7 Bro. P. C. 511.

(v) *Blinkhorn and Feast*, 2 Ves. 29.

(w) *Ib.*

(x) *Dicks v. Lambert*, 4 Ves. 731. *Griffiths v. Rogers*, Prec. Ch. 231. cited 3 Atk. 229. *Lady Grenville v. Duchess of Beaufort*, 1 P. Wms. 114. 8. C. Vin. Abr. 2 Vern. 648. 1 Bro. P. C. 305. *Blinkhorn and Feast*, 2 Ves. 29. *Newstead v. Johnson*, 2 Atk. 46. *Southcote v. Watson*, 3 Atk. 228.

(y) *Colesworth v. Brangwin*, Prec. Ch. 323. *Bishop of Cloyne v. Young*, 2 Ves. 97. *Johnson v. Twist*, cit. 2 Ves. 166. *Butler v. Bradford*, 2 Atk. 320.

(z) *Griffiths v. Hamilton*, 12 Ves. 298.

(a) *Brasbridge v. Woodroffe*, 2 Atk. 69. *Blinkhorn and Feast*, 2 Ves. 30. *Bowker v. Hunter*, 1 Bro. C. C. 328.

Griffiths v. Hamilton, 12 Ves. 309.

(b) *Oliver v. Fawen*, 1 Bro. C. C. 590.

(c) *Lady Grenville v. Duchess of Beaufort*, 1 P. Wms. 114. 1 Bro. P. C. 305. and confirmed 1 P. Wms. 551.

(d) *Holford v. Wood*, 4 Ves. 99. *Southcote v. Watson*, 3 Atk. 236, 1.

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reversionary interest will exclude the executor.(e) Distinct specific legacies of equal value, to several executors,(f) excludes them from the residue; but a specific legacy to one of two executors, will not bar them;(g) nor will distinct specific legacies, of unequal value, to both, bar them.(h)

Wherever there is no clear intention that the testator shall not take, as in those cases where a legacy is expressly given "for his care and trouble,"(i) but it is only inferred and presumed, from expressions used in the will, that the testator did not intend that the executor should take, the executor (dangerous as the allowance of such evidence is)(k) may adduce parol evidence,(l) and even, it seems, of declarations by the testator, made previous or subsequent to(m) the making of the will,(n) as well as at the time of the making of "it, to show that the intention, at the time of making the will, was, that he should have the residue, or that the next of kin were not to have it.(o) He may thus (not rebut the equity, an inaccurate expression generally used,(p) but more properly) answer or rebut(q) the presumption in equity(r) against his legal title.(s) *Littlebury v. Buckley*(t) was the first case where parol evidence was admitted.(u) The

(e) *Selcy v. Wood*, 10 Ves. 74.

(f) See on this head *Nisbet v. Murray*, 5 Ves. 158.

(g) *Bishop Cloyne v. Young*, 2 Ves. 98.

(h) 5 Ves. 158.

(i) See the cases, ante p. 86.

(k) 2 P. Wms. 215.

(l) *Petit and Smith*, 1 P. Wms. 9. *Wingfield v. Atkinson*, 2 Vern. 673. *Lady Gainsborough v. Lord Gainsborough*, 2 Vern. 252. and 1 P. Wms. 116. *Duke Rutland v. Duchess of Rutland*, 2 P. Wms. 213. *Walton v. Walton*, 14 Ves. 322.; and see *Clennell v. Lewthwaite*, 2 Ves. jun. 649. and the observation there made, and the excellent judgment in that case by the master of the rolls, 2 Ves. jun. 471. etc.

(m) See *Walton v. Walton*, 14 Ves. 323.

(n) But see contra, *Duke v. Duchess of Rutland*, 2 P. Wms. 209. where it is

said, "discourses at different times from that of making the will, cannot be given in evidence." *Norris and Fiach*, 1 Ves. jun. 359. 8. C. 4 Bro. C. C. 239. etc. *Pole and Lord Somers*, 6 Ves. 324.

(o) *Brasbridge v. Woodroffe*, 2 Atk. 69.

(p) As in 2 Vern. 253. in marginal note on *Petit and Smith*, 1 P. Wms. 9. and in 1 P. Wms. 116. and in *Cloyne v. Young*, 2 Ves. 95. and in 2 P. Wms. 213. and in *Lake v. Lake*, Amb. 127.

(q) See *Langham and Sandford*, 17 Ves. 449.

(r) See what is said in *Pole v. Lord Somers*, 5 Ves. 311. *Littlebury and Buckley*.

(s) See *Lady Grenville v. Duchess Beaufort*, 1 P. Wms. 114. *Urquhart v. King*, 10 Ves. 229.

(t) 2 Vern. 677.

(u) Amb. 127.

next of kin, on their parts, may bring evidence in answer to the evidence adduced by the executor.

To entitle the executor by the evidence, it ought to be plain and indisputable;(v) and most of the cases where an executor has succeeded upon evidence, has been where the evidence shows declarations of direct intention in his favour.(w)

If the evidence on both sides be contradictory, the next of kin will take.(x) There is no instance of an issue being directed in these cases.(y)

It seems, that if legacies be given to two executors, and one disclaims, his legacy will not go *to the other executor, but is divisible amongst the next of kin.(z) *93

If a legacy is left to a man described as executor, and the office of executor does not continue, he is not entitled to the legacy; but this presumption may be rebutted by circumstances, showing that the legacy was intended personally, and not merely as executor;(a) and there is no case of a legacy specially given to an individual, and the residue afterwards given to that individual by way of legacy, in which that sort of doctrine has been applied.(b)

In case of a *deficiency of assets*, all the legatees by the will or codicils(c) must *abate* in proportion; nor will the court strain to prefer one legatee to another, but will let the general rule of equality take place, unless there be strong words to the contrary.(d) and something insuperable in the will.(e) that does not justify the court in doing it.(f)

The court has disclaimed laying weight on particular words, as the saying, "*imprimis*," or "in the first place,"(g) or a direction for the time of payment;(h) but where the intention is clear, it will be attended to: as where one by will gave several

(v) *Petit v. Smith*, 1 P. Wms. 9. 417. *Read v. Devaynes*, 3 Bro. C. C.

(w) *Langham v. Sandford*, 17 Ves. 95.

450.

(x) *Hornaby v. Finch*, 1 Ves. jun.

344. 8. C. 2 Ves. jun. 78. S. C. 4 Bro. C. C. 239. etc.

(y) *Trimmer v. Bayge*, 11 Ves. 515.

(z) Vid. the observation in the latter part of the able judgment in *Bowler v. Hunter*, 1 Bro. 384.

(a) *Stackpole v. Howell*, 13 Ves.

(b) *Roach v. Haynes*, 8 Ves. 593.

(c) 2 P. Wms. 23.

(d) See *Blower v. Morret*, 2 Ves. 421.

(e) As in *Marsh v. Evans*, 1 P. Wms.

669. *Lewin and Lewin*, 2 Ves. 47.

(f) *Clarke v. Sewell*, 3 Atk. 69.

(g) *Brown v. Allen*, 1 Vern. 31.

(h) *Bowler v. Morret*, 2 Ves. 421.

*legacies, and afterwards, in the same will, expressing an idea that there would be a surplus, *therefore*, gives further legacies; the legacies in the former part of the will were, upon a deficiency, preferred. (h).

As charitable legacies were, by the *civil law*, preferred to other legacies, so, in some of the earlier cases, the court of chancery, on a deficiency of assets, gave a preference to charitable legacies; (i) but subsequent cases have established, that charitable legacies are, on a deficiency of assets, to abate proportionably with other legacies. (k)

Appointing a legacy to be paid at a *different time* will not give a preference; (l) nor does a legacy to an executor, for *care and pains*, make any difference. (m).

If, however, a legacy be given to a wife, in *consideration that she release dower*, it will be preferred. (n) So, if money be bequeathed for a monument, (o) or to buy land, or as it has been held, an annuity, (p) it is considered as a specific legacy, and will not come in *average*.

*95 *A residuary legatee, on a deficiency of assets, has been allowed, under special circumstances, to come in, *pari passu*, with the other legatees: as where the testator, at the time of making his will, knew what the surplus would amount to, and gave the same as a legacy to his eldest son. (q).

If a man devises his real estate in trust, to pay several persons 1,000*l.* each, and any of those persons die in his life, in case of a deficiency, the others must abate; but if the devise is in trust to pay his debts and legacies, and he gives several le-

(h) Attorney General v. Robbins, 2 P. Wms. 23.

(i) Fielding v. Bound, 1 Vern. 230.

(k) Attorney General v. Hudson, }
P. Wms. 674. Masters v. Masters, ib.
422. Attorney General v. Robbins, 2
P. Wms. 23.

(l) Clarke v. Sewell, 3 Atk. 99.

(m) 2 Vern. 434. 2 Atk. 171. 2 P.
Wms. 25.

(n) Burridge v. Brady, 1 P. Wms.
126. Davenhill against Fletcher, Amb.

244. and Blower v. Morret, there men-
tioned; see also 1 Ves. 133.

(o) 1 P. Wms. 423.

(p) 1 P. Wms. 126., contra, Hinton
v. Pinke, 1 P. Wms. 539., and what is
said in 3 Atk. 693. Hume v. Edwards,
and in Lewin v. Lewin, 2 Ves. 417.
particularly as to Hinton v. Pinke.

(q) Dyose v. Dyose, 1 P. Wms. 305.;
but see what is said of that case in 1
Bro. C. C. 478. and in Humphreys v.
Humphreys, mentioned in note to 1 P.
Wms. 306. n. 2.

gacies, and one of the legatees dies, the fund is a trust for the benefit of all the other legatees if necessary.(r)

If *specific* and *pecuniary* legacies are given, and there are not assets to pay both, the specific legatee is preferred, and takes his whole legacy,(s) and does not abate in proportion with other legatees;(t) but they may abate proportionably amongst themselves.(u)

A devisee of an annuity for life, charged on the personal estate, is not considered as a *specific* legatee, and, therefore, in case of a deficiency of assets, must abate in proportion with other legatees.(v)

*If legacies are given payable at a future time, and at the death of the testator the assets are deficient; but, by profits in the mean time accruing, the assets afterwards become sufficient, all the legacies must be paid, for those profits are part of the personal estate.(w)

If one seized in fee of some lands, and possessed by lease for years of other lands, devises the fee to A. and the lease to B. and dies indebted by bond, and there is a deficiency of assets, both the devisees must contribute to the payment of the bond; but as to the simple contract debts, if there should not be enough, over and above to pay them, they must fall upon the leasehold premises only.(x)

If an executor pays one legatee, and it afterwards appears there is a deficiency of assets, the legatee must in equity, and in equity only, for no *action* lies,(y) refund a proportionable part of what has been paid;(z) and it is the same where the legacy is paid in virtue of a decree;(a) but if the deficiency of assets is occasioned by the *wasting* of them by the executor, a lega-

(r) *Carrie v. Pye*, 17 Ves. 486.

(s) *Clifton v. Bart*, 1 P. Wms. 679, 690. *Brown v. Allen*, 1 Vern. 31.

(t) *Webb v. Webb*, 2 Vern. 111.

(u) *Sleach v. Thorrington*, 2 Ves. 561.

(v) *Hame v. Edwards*, 3 Atk. 693.

(w) *Green v. Ekins*, 2 Atk. 476.

(x) *Long v. Short*, 1 P. Wms. 404.

(y) *Johnson v. Johnson*, 3 Bos. and Pal. 169.

(z) *Edwards v. Freeman*, 2 P. Wms.

447. *Davis v. Davis*, 1 Dick. 32. *Roberts v. Roberts*, Bro. C. C. 487.; but see contra, *Newman v. Barton*, 2 Vern. 495. and *Coppin v. Coppin*, 2 P. Wms. 296., which, however, seems to have been decided as it was, because it was a hard case.

(a) *Newman v. Barton*, 2 Vern. 496.

tee who has recovered his legacy, (b) or to whom it has been voluntarily paid, (c) is not compellable to refund.

*97 *Where a legacy is given to an infant, a payment to the father is not valid; but if the sum be small, payment has been allowed to the child, but not, it seems, if the sum be above 100*l*. (d)

Formerly, payment to the father was allowed; (e) but since the case of *Dagley v. Tolferry*, (f) the idea of the court has been, that it is not a good payment, and that even in the case of an adult child it is not good, unless done with the consent of the child, or made so by a subsequent ratification. (g) But where a legacy is given to A. to be divided between himself and his family, it may be paid to A. (h)

As payment of a legacy to the father of an infant was not allowed, it became necessary for infant legatees to file bills for the payment of their legacies; but, by the statute, such suits are now rendered unnecessary. (i)

3. We shall now advert to that species of implied trusts which arise from purchases made in the name of a third person; and out of purchases with notice of a trust.

*98 If an estate be purchased with the money of A. and the estate is conveyed to B. who is a stranger, B. will be a trustee for A. and it is such *a resulting trust by implication of law as is saved by the statute, and needs no declaration of trust. (k)

The law implies a trust in such case; (l) but he must clearly prove the payment of the money. (m)

Such proof may appear either from expressions or recitals in the purchase deed; (n) or from some memorandum or note of the

(b) Anonymous, 1 P. Wms. 495.; Bro. C. C. 186.; and see Robinson v. Noel v. Robinson, 1 Vern. 94. Tickell, 8 Ves. 142.

contra, Hardwick v. Mynd, 1 Anstr. 112. Anon. 1 Vern. 162. (i) See 36 Geo. III. c. 52. s. 32., and 4 Ves. 630.

(c) Orr v. Kaines, 2 Ves. 194. (k) Gascoigne v. Thwing, 1 Vern. 366. Finch v. Finch, 14 Ves. 50. S.

(d) See Phillips v. Paget, 2 Atk. 8. C. MS. Ryall v. Ryall, 1 Atk. 59. S.

(e) As in Holloway v. Collins, 1 Eq. Abr. C. Appl. 413. See Smith v. Baker, 1

(f) 1 P. Wms. 285. S. C. 1 Eq. Abr. 300. Gilb. Eq. Rep. 103.; but see the Atk. 325. 2 Atk. 75.; and see 5 Ves. 208.

remark on this case in Phillips v. Paget, 2 Atk. 81. (l) See Young v. Peachy, 2 Atk. 256.

(g) Cooper v. Thornton, 3 Bro. C. C. 97. (m) Willis v. Willis, 2 Atk. 71.

(h) Ib. 96., confirmed on appeal, 3 Kirk and Webb, Ib. 84. cited 1 Sanders

on Uses, p. 258.

nominal purchaser;(e) or from his answer to a bill of discovery;(p) or from papers left by him, and, discovered after his death;(q) but whether, after the death of the supposed nominal purchaser, parol proof alone is admissible, against the express declaration of the deed, has been a subject of controversy,(r) though, it seems, it may.(s)

So, if the estate has been purchased with the money of A. and conveyed to A. and B. who are strangers, B. would be a trustee for A.(t) But if the estate were purchased with the money of A. and conveyed to a child of A. legitimate or illegitimate,(u) (if to a grandchild of A. the father being alive,(v) it might be different),(w) this distinguishes it from the case of a stranger, in which there is not that natural affection that would repel the presumption arising from the advance of the money, and it will, unless some precedent declaration can be proved,(x) be considered as an advancement of the child of A.; but that is liable to be rebutted by subsequent acts.(y) Nor would it in such case be held a trust for the father, though he should take possession of the estate, and receive the rents and profits during the child's infancy.(z) It might be different, if he received the rents and profits after the child was of age,(a) especially if the child was of age when the estate was purchased.(b)

If the father bought the estate in the names of his son and a trustee,(c) or, as it seems, in the name of himself and his son.(d)

(e) O'Hara v. O'Neal, 2 Eq. Abr. 745.

(p) Cottington v. Fletcher, 2 Atk. 155.; but see Edwards and Moore, 4 Ves. 23. cit. 1 Sand. 258.

(q) Ryall v. Ryall, Ambl. 413. Lane v. Dighton, ib. 409.

(r) See 1 vol. Sand. on Uses, p. 259., and the note to Lloyd and Spillet, 2 Atk. 150. Roberts on Frauds, p. 99. Sugd. Vend. and Purch. 508. last edit.

(s) See Lench v. Lench, 10 Ves. 511.

(t) See 10 Ves. 367. Rider and Kinder; and see Benger v. Drew, 1 P. Wms. 780.

(u) Loft. 490. Fearn. Posth. 327. 2 Fonbl. Eq. 124, 5.

(v) Ebrand v. Dancer, 2 Ch. Ca. 26.

(w) See Lloyd v. Read, 1 P. Wms. 40.

(x) Lord Gray's case, 2 Freem. 6.

(y) Lord Gray's case, 2 Freem. 6. Pole and Pole, 1 Ves. 78.

(z) Mumma v. Mumma, 1 Atk. 19. Lamplugh v. Lamplugh, 1 P. Wms. 118. Taylor v. Taylor, 1 Atk. 386. Stillman v. Ashdown, 2 Atk. 480. Finch, 340. Reddington v. Reddington, 3 Ridgw. P. C. 106.

(a) Lloyd v. Read, 1 P. Wms. 608.

(b) Lex Prætoria, MS.

(c) Lamplugh and Lamplugh, 1 P. Wms. 111.

(d) Scroope and Scroope, 1 Ch. Ca. 27. Back and Andrews, 2 Vern. 120.

Dyer v. Dyer, noticed in note 1. to 1 P.

(though as to this Lord *Hardwicke* expressed a different opinion.) (e) *still will the purchase be considered as an advancement. But, in these instances, the father will have the benefit of survivorship, in case the son die during his minority; but the son is not entitled to the benefit of survivorship as against the judgment creditor of the father. (f)

Whether the purchase by the father, in the name of his son, be a *fee-simple* or a *reversion* is immaterial, for the proximity or possible remoteness of the possession does not affect the rule. (g)

It seems in all these cases, that if the son is provided for at the time of the purchase in his name, he will be but a trustee, and stands in the same predicament as a stranger; (h) but a *reversion* settled on the son, expectant on the mother's death, is not such a provision as will prevent the son taking. (i) A difference has been taken between a purchase in the name of a son and of a daughter; for though sons are often provided for by settlement of lands, yet daughters seldom are, and therefore the presumption is not so strong. (k)

Perhaps, if a purchase were made by a husband in the name of his wife, it would not be considered as an implied trust, but she would be beneficially *entitled, (l) for a wife cannot be a trustee for her husband. (m)

If a bond be taken by A. in the name of B. an implied trust will be raised in favour of A.; but if a grandfather, the father being dead, takes a bond in the name of his grandchild, it will be considered as an advancement of the grandchild. (n) If the father had been alive, the child would have been but a trustee. (o)

If A. buys an annuity in the name of B. A. paying for it,

Wms. 112, but best reported in West. on Copyholds, p. 216.; and see Finch v. Finch, 14 Ves. 50. S. C. M8.

(e) 2 Atk. 480.

(f) Stileman and Ashdown, 2 Atk. 480. S. C. Amb. 13.

(g) Finch v. Finch, 14 Ves. 50.

(h) Elliot and Elliot, 2 Ch. Ca. 232. Pole and Pole, 1 Ves. 76., and Ilbyd v. Read, 1 P. Wms. 687.

(i) Lamplugh v. Lamplugh, 1 P. Wms. 111.

(k) Gilb. Lex Prætoria, M8. who cites C. C. 24, 30.; but see Lady George's case, 3 Cro. 560.

(l) See Rider and Kidder, 10 Ves. 367., and Back v. Andrews, 2 Vern. 62. 128. Batch v. Andrews, Ch. Ca. 52.; but see Smith v. Baker, 1 Atk. 225.

(m) Wingdon v. Bridges, 2 Vern. 67.

(n) 1 Eq. Abr. 382.

(o) Lloyd and Read, 1 P. Wms. 607.

and *B.* has no proof that it was meant as a provision for her; there will be an implied trust raised in favour of the person who paid the money. (p)

In general, there is no doubt, that if one person buy in the name of another, he who pays the money is the equitable owner; unless the presumption from that circumstance is repelled by evidence; (q) but an exception to this rule is introduced by the registry act, in the case of a *ship*; for if *A.* purchase a ship in the name of *B.* and the sale is registered in the name of *B.* *B.*'s title cannot be dislodged. (r)

And where a ship was purchased with joint partnership property, but registered in the name *of only one of the partners, *102 it was held, owing to the strong provisions of the register acts, that even against a claim by creditors, no implied trust arose in favour of the partners in whose name the ship was not registered. (s)

Where two or more purchase lands, and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint tenancy, that is, a purchase by them jointly, of the chance of survivorship, which may happen to the one of them as well as to the other; (t) but where the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and however the legal estate may survive, yet the survivor is considered but as a trustee for the others, in proportion to the sums advanced by each of them. So, if two or more make a joint purchase, and afterwards one of them lays out a considerable sum of money in repairs and improvements, and dies, this is considered as a lien on the land, and a trust for the representative of him who advanced it; and in all other cases of a joint undertaking or partnership, either in trade or any other dealing, they will be considered as tenants in common, or the survivors as trustees for those who are dead. (u)

*But a real estate, purchased with a partnership fund, is not, *103

(p) See *Rider and Kidder*, 10 Ves. 362. (q) *Lake v. Gibson*, 1 Eq. Abr. 221. 366. *Mortimer and Davis*, 10 Ves. 362. *Moyse v. Giles*, 2 Vern. 285.

(g) *Rider v. Kidder*, 10 Ves. 360. (u) *Lake and Gibson*, 1 Eq. Abr.

(r) *Ex parte Houghton*, 17 Ves. 241. 291. S. C. 3 P. Wms. 158. under name

(s) *Ex parte Yallop*, 15 Ves. 60.; of *Lake v. Gryddock* and see *Curtis v. Perry*, 6 Ves. 730.

on the death of one partner, considered as *personalty*, but descends to the heir.(v) A partnership agreement may alter the nature of real estate, and convert it to all intents and purposes,(w) but it must be *express* to do so.(x)

It is a rule in equity, "*that all persons coming into possession of property bound by a trust, with notice of the trust, shall be considered as trustees,*"(y) though they take by fine.(z) Whoever so comes into possession, is considered as bound, with respect to that special property, to the execution of the trust. And if a purchaser has notice of the trust *before the execution of the conveyance*, he is bound, though he had no notice when he paid his money.(a)

But it has been long settled, and has before been observed, that where a man, by deed or will, charges, or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application.(b)

If a person purchases an estate, which he sees himself has a defect upon the face of the deeds, yet a fine will be a bar, and *104 notice will not affect *him so as to make him a trustee for the person who had the right; for the defect upon the face of the deed is often the occasion of fines being levied.(c)

A *fine and nonclaim* to or by a person having notice of the trust,(d) will not bar the *cestui que trust*. A mortgagee, therefore, cannot, by fine and nonclaim, bar the equity of redemption.(e) So, if a trustee conveys to a person with notice, and takes a reconveyance, it operates nothing; and if even the person to whom he conveyed had no notice, yet, on the reconvey-

(v) Bell v. Phyn, 7 Ves. 453. Smith v. Smith, 5 Ves. 189.

(w) Ripley v. Waterworth, 7 Ves. 435.

(x) Thornton against Dixon, 3 Bro. C. C. 199.

(y) Daniel v. Davison, 16 Ves. 249. Adair v. Shaw, 1 Sch. and Lefr. 262.

(z) Kennedy v. Daly, 1 Sch. and Lefr. 379.

(a) Wigg v. Wigg, 1 Atk. 384.

(b) See what is said in note to Jenkins v. Hiles, 6 Ves. 654. overruling the

doctrine on that subject in Omerod and Hardman, 5 Ves. 722.

(c) Story v. Lord Windsor, 2 Atk. 631.

(d) See Kennedy v. Daly, 1 Sch. and Lefr. 379.; and see case put by lord keeper in Bovey and Smith, 1 Vern. 149. This case was reversed in the house of lords. See Martin v. Martin, Vin. Abr. title Fraud, A. (pl. 12.) noticed by Lord Redesdale in Kennedy v. Daly.

(e) 1 Sch. and Lefr. 390. Story v. Windsor, 2 Atk. 631.

ance, the trust would attach, though it did not attach on the person to whom he conveyed; nor would have attached, if that person had conveyed to another, without notice.(f)

It is not clear how far a purchaser may be affected by a constructive or doubtful trust.(g)

A trust estate will pass under a general devise by the trustee; but the devisee takes the land subject to the original trust.(h) If the devise by the trustee is for purposes or under limitations *inconsistent with the idea that the trust estate was intended to *105 pass, it will not pass.(i)

If *A.* devises lands to *B.* on condition to pay *C.* a sum of money, and there is no clause of entry, this is no charge on the estate to give the legatee of the money a lien on the lands, but the heir at law may enter and take advantage of the condition; but, in equity, he is considered only as a *trustee* for the legatee.(k)

Where a vendor conveys his estate to the vendee, without receiving all or part of the consideration money, he has, as against the vendee and his heir,(l) and all persons claiming as *volunteers*, or purchasers for a valuable consideration, *with notice*, a lien upon the estate for the whole, or such part of the purchase money as was not paid;(m) and this, though the consideration is upon the face of the instrument expressed to be paid, and a receipt endorsed.(n) Nor does the bankruptcy of the vendee affect the lien of the vendor.(o) So, on the other

(f) 1 Sch. and Lefr. 379.; and see *Bovey v. Smith*, 1 Vern. 60.; and see *Lowther v. Carlton*, 2 Atk. 242. and the cases cited in the note by Mr. Sanders.

(g) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

(h) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

(i) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

(k) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

(l) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

(m) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

(n) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

(o) See 1 vol. Sanders on Uses, p. 386. last edit. and the following cases cited by him, *Warwick v. Warwick*, 3 Atk. 293. *Sénhouse v. Earl*, Ambl. 285. *Cottwell v. Mackrill*, Ambl. 515. *Hardy v. Reeves*, 5 Ves. 426. *Parker v. Brooks*, 9 Ves. 583.

hand, if the purchaser of an estate prematurely pays the purchase money, before the estate is conveyed to him, the money

- *106 *will be considered as a lien on the estate in the hands of the vendor for the vendee, or, in case of his death, for his personal representatives.(p)

But in one case, where lands were sold, but not paid for, and the vendee died, and the vendor was heir and executor of the vendee, he was allowed to take the land as heir, and pay himself the consideration of the purchase out of the assets, and was not confined to his lien on the real estate, though by that means legatees were left unpaid.(q)

The rule is confined merely to the vendor and vendee, and will not extend to a third person.(r) And in all these cases, if by the contract, or other circumstances, it is evident that a lien by implication was not intended to be reserved, a lien cannot be claimed.(s)

The equitable lien may be waived where a *special security* is given for the purchase money, a pledge of stock, for instance,(t) or a mortgage of another estate of the vendee;(u) but the rule seems to be, that another security taken will, according to circumstances, afford evidence that the lien was not intended to be relied upon.(v)

- *107 Where one sold an estate and took a *bond* for *the consideration money, it was held that the vendor had no lien against the creditors of the vendee for whose benefit the estate had been assigned.(w) So, where a *note* was taken for part of the consideration money;(x) but if the note is not relied on as a security, it does not destroy the lien. If bills were given as part of the purchase money, drawn upon an insolvent house, such bills will not discharge the lien, for they are taken, not as a security, but as a mode of payment.(y)

If *A.* purchases an estate of *B.* without notice of *rent charges*,

(p) 15 Ves. 345. 1 Sch. and Lefr. 136.

(q) *Coppin v. Coppin*, 2 P. Wms. 498.

(r) *Polexton v. Moque*, 5 Atk. 271.

(s) *Ib.* p. 347; and see *Austen v. Halsey*, 6 Ves. 483.

(t) *Nairn v. Frowse*, 6 Ves. 722.

(u) *Ib.* p. 780.

(v) *Mackreth v. Symonds*, 15 Ves.

347.

(w) *Fawell against Meelis*, Ambl. 724. S. C. 1 Dick. 485.

(x) *Bond v. Kent*, 2 Vern. 280.

(y) *Hughes v. Kearney*, 1 Sch. and Lefr. 136.

Sec. and the vendor covenants that there are no encumbrances, and the purchase money is laid out in the funds, and B. afterwards sells the dividends for his life, secured by letter of attorney to C; who has no notice, and then A. is evicted by the grantee of the rent charges, he has no lien on the funds purchased as against C.(z)

2. As to *resulting trusts*, it was the observation of Lord Hardwicke, that, "in consequence of the *statute of frauds* nothing can be construed a *resulting trust*, but what are there called trusts by operation of law; which are of two kinds, 1st. Where an estate is purchased in the name of another, but the money or consideration is given *by another, of which we have already *108 treated, or, 2dly. Where a trust is declared only as to part, and nothing said as to the rest, what remains undisposed of results to the heir at law.(a). There are no instances, but these two, where this court has declared resulting trusts by operation of law; unless in cases of fraud, and where transactions have been carried on *male fide*."(b)

A learned writer(c) has criticised this proposition, and considers it as inaccurate; but the instances he puts do not seem to warrant his objection, and all of them fall within the terms of Lord Hardwicke's proposition.

We have already seen,(d) that in the absence of express or demonstrable intention to the contrary, it is an established principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered, "by the transmutation of a court of equity," to use Lord Hardwicke's expression,(e) as that species of property into which they are directed to be converted;(f) and this in whatever manner the direction is given: whether by *will*, by way of *contract*, **marriage articles*, *settlement*, or *otherwise*; and *109 whether the money is actually deposited; or only covenanted to

(z) *Cator v. Earl of Pembroke*, 1 Bro. C. C. 303. and 2 Bro. C. C. 282.

(a) *Lloyd v. Spillet*, 2 Atk. 150. *Harcourt and Weymouth*, 2 Vern. 645.

(b) *Lloyd v. Spillet*, 2 Atk. 150.

(c) 2 Fynb. Rep. 117. in notes.

(d) *Ante*, 288.

(e) *Guidot v. Guidot*, 3 Atk. 256.

(f) See *Doughty v. Ball*, 2 P. Wms.

323. *Attorney General v. Johnston*,

Ambl. 580: *Vid. Gibbs v. Ogier*, 12

Ves. 415. *Berry and Usher*, 11 Ves. 87.

Robinson and Taylor, 2 Bro. C. C. 599.

3, C. 1. *Ven. jun.* 44. *Williams and*

Coade, 19 Ves. 569.

be paid; whether the land is actually conveyed, or only agreed to be conveyed.(g) Nothing is more clear than this principle, and the only question in cases of this kind is, whether the character of land or money is definitively, or imperatively affixed to the property; or whether it is left as matter of uncertainty, in what manner the owner of the property intended it to descend.(h) If the intention is discoverable internally in the deeds or wills, that will determine whether money is to be considered as land, or land as money; for the rule adverted to, only applies in the absence of express or demonstrative intention.(i) The decisions have, it seems, overruled the doctrine of Lord Rosslyn,(k) that property was to be taken as it happened to be at the death of the party from whom the representatives claimed.(l)

But where a person dealing upon his own property only, has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, *110 *when the purpose fails, the intention fails; and a court of equity regards him as not having directed the conversion.(m)

In cases of wills, therefore, as in deeds, it is important to consider, whether the testator meant to give to the produce of the real estate the quality of personalty, to all intents, or only so far as respected the particular purposes, of the will; for unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty, for the purposes of the will, but further, that the produce of the real estates shall be taken as personalty, whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence,(n) or the inefficacy of the will itself, or from subsequent lapses) will next to the heir.(o)

(g) Fletcher v. Ashburner, 1 Bro. C. C. 499.; and see Mr. Hargrave's able argument in Fultney v. Dartington, 1 Bro. C. C. 226, 7.

(h) 441. Whistale v. Partridge, 5 Ves. 227.; and see Bidolph and Bidolph, 14 Ves. 181.

(i) Stafford v. Bechem, 3 Atk. 446. See Whistale and Partridge, 5 Ves. 227.; and S. C. on appeal, 6 Ves. 227.;

and see also Thornton v. Hawley, 10 Ves. 129. which cases arose on deeds.

(k) Walker v. Deas, 2 Ves. jun. 170.

(l) See Kirkman and Milnes, 13 Ves. 338.

(m) Ripley v. Waterworth, 7 Ves. 435.

(n) Collins v. Walsman, 2 Ves. 627.

(o) See Mr. Cox's able note to Orme v. Bailey, 8 P. Wms. 22. note 1., and

If a sum of money be devised in trust, to be laid out in land, and the uses to which the land should go are not declared, the benefit of that money, it seems, will go to the heir at law, as a *resulting trust*.(p) So, on the other hand, if a *real estate be devised to be sold, and no particular directions are given how the purchase money should be applied, in whole or in part, the money undisposed of will, it seems, go to the executor, to be applied in a course of distribution, or to a residuary legatee of the personal estate, if any such there be.(q)

If the purpose for which the conversion was directed is *illegal*, the property, it seems, will go as if unconverted.(r)

If there be a devise of real estate for payment of debts, and nothing more is meant than to make a provision for the debts, all beyond what is required for that purpose will remain *real estate*, and as such go to the heir;(s) the general principle being, that the heir takes all that which is not for a defined and specific purpose given by the will.(t) If the intention is to convert it into personal property, *for all the purposes of the will*, though some of those purposes should fail, and though in consequence of that failure part results to the heir, it would result to him as *personal estate*, and be so considered in a question between his representatives.(v)

So, where a testator creates an executory trust, or devise, to take effect within the limit allowed by law, and makes no disposition of the *intermediate beneficial interest, the trust or equitable estate will descend to the heir, until the contingency happens, upon which the equitable executory devise is to arise.(w)

the cases there quoted. See also Randall v. Bookey, 2 Vern. 425. Stonehenge v. Evelyn, 3 P. Wms. 253. Ackroyd and Smithson, 1 Bro. C. C. 563. Gibbs and Ogier, 12 Ves. 415. Berry and Usher, 11 Ves. 67. Robinson and Taylor, 2 Bro. C. B. 569. S. C. 1 Ves. jun. 44. Williams and Coode, 10 Ves. 500. Kennel v. Abbot, 4 Ves. 810. Hooper v. Goodwin, 18 Ves. 154. Stanfield v. Habersham, 10 Ves. 279. Hill v. Cock, 18 Ves. 174.

(p) Hayford v. Bealows, Amb. 592.

(q) Ib. 583.

(r) See Towaley v. Bedwell, 6 Ves. 194.

(s) Wright and Wright, 16 Ves. 191. Hill v. Cock, 18 Ves. 174. King v. Denison, 1 Ves. and Ben. 272. See Collins v. Wellesman, 2 Ves. 697.

(t) Ohtty v. Parker, 2 Ves. jun. 271.

(v) 16 Ves. 181.; and see Hewitt and Wright, 1 Bro. C. C. 86., and Kidney v. Cousenmaker, 2 Ves. jun. 268.

(w) Sanders on Uses and Trusts, 1 vol. 263. Feame on Executory Devises, p. 537. Hopkins v. Hopkins, 1 Atk. 584. S. C. Fer. 44. and in MS.

If one gives to A. and his heirs all his real estate, "*charged with his debts*," that is a devise to him for a particular purpose; but not for that purpose only. If the devise is, "*upon trust to pay his debts*," that is a devise for a particular purpose, and has a different effect: the former is a devise of an estate of inheritance, for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, it being intended to be given to him.(x)

Upon a devise to a good charitable use, the heir has no right to the rents and profits accrued before the devise is carried into effect.(y)

*113 As we have seen, voluntary conveyances may be good and effectual; but circumstances of fraud, mistake, or the like, may convert a grantee, under a voluntary conveyance, into a trustee.(z)

We shall conclude the subject of *trusts* with a few observations in respect to,

1. *Breaches of Trusts*.—2. *Allowances to Trustees*; and, 3. *The Removal of Trustees*.

It has been the constant habit of courts of equity to fix persons in the character of trustees, with the consequence of a breach of trust,(a) or to charge their representatives, whether they derive benefit from the breach of trust, or not.(b) And

Attorney General v. Bowyer, 3 Ves. vol. 267. who cites 1 Freem. 305. 308. 725. *Stanley v. Stanley*, 16 Ves. 491. 2 Atk. 150. *Duke of Norfolk v. Browne*,

(x) *King v. Denhon*, 1 Ves. and Bed. Prec. Ch. 80.

272, 3. (y) *Vernon v. Vawdry*, Barnard. 303.

(z) *Attorney General v. Bowyer*, 3 (b) *Adair v. Shaw*, Sch. and Lefr. 272. *Lord Montford v. Lord Cadogan*,

(x) *Sanders on Uses and Trusts*, 1 17 Ves. 489.

Lord Hardwicke seems to have thought, that a court of equity has jurisdiction over every breach of trust, let the person guilty of it be either in a *public* or *private* capacity.(b)

Lord Hobart says, that a *cestui que trust* may bring an action on the case against his trustee, and recover for a breach of trust, in damages, and Lord Jefferys appears to have countenanced that doctrine ;(c) but that would be to give a court of law a degree of jurisdiction in cases *of trusts, which it has always anx- *114
iously declined.

A breach of trust is considered but as a simple contract debt, and can only fall upon the personal estate of a trustee,(d) unless the trustee be a banker,(e) or has acknowledged the debt to the trust estate, under hand and seal ;(f) and the particular circumstances of a case ought not to vary the rule.(g)

Two principles appear to have been adopted in regard to the liability of executors : 1st, That, with a view not to deter persons from undertaking a trust, the court is extremely liberal ; and will so determine, as not to strike a terror into mankind, acting for the benefit of others, and not for their own.(h) It will endeavour to deliver a trustee from any mischief that may happen from a misapplication of trust-money.(i) 2dly, That care must be had to guard against abuse.(k)

Where executors intend fairly to discharge their duty, the court will not hold them liable upon slight grounds.(l)

It seems, that in general, where an executor is *decreted* to account, *annual rests* are not made.(m) But where, under a will, an executor was directed *not to derive any advantage from *115
keeping money in his hands without accounting for legal interest, and to accumulate for the *cestui que trust*, it was, on a bill for that purpose, decreed, that a computation should be made of

(b) The Charitable Corporation v. Sutton, 2 Atk. 406. Lonsdale v. Church, 3 Bro. C. C. 41.

(c) Jevon v. Bush, 1 Vern. 344. ; and see 1 Eq. Abr. (D) note (a) ; but see what is said in Bamardistone v. Soane, State Trials, 7 vol. 443.

(d) Vernon v. Wadry, 2 Atk. 119. S. C. Barn. 280. Cox v. Bateman, 2 Ves. 19.

(e) See 8 Geo. I.

(f) Gifford v. Manley, For. 109.

(g) 2 Atk. 119.

(h) See Ambl. 239. Powell v. Evans, 5 Ves. 843.

(i) Trafford v. Boehm, 3 Atk. 444.

(k) See Raphael v. Boehm, 13 Ves. 410. ; and see S. C. 13 Ves. 591.

(l) Powell v. Evans, 5 Ves. 843.

(m) Robinson v. Cunningham, 2 Atk. 410.

interest at 5l. per cent. on all sums received by him, while in his hands ; and that the master should, in such computation, make half yearly rests.(n)

If an executor, who is under such a direction to accumulate, becomes a bankrupt, his estate is chargeable as in equity, with interest, and five per cent. with rests.(o)

The court, it has been held, will not charge interest upon an executor who makes use of assets come to his hand in the way of his trade ; but if an executor has placed out assets that were specifically devised, the court will oblige him to account for the interest he may have made of those assets.(p) Lord Harcourt, however, decided, that if a trustee trades with money, he is accountable, and not merely for interest, but the profit of the trade ;(q) and this is now the rule.

In other cases executors have, under circumstances, been directed to pay interest on balances in their hands, and costs.(r)

- *116 The court will not permit an executor to *keep his testator's money dead in his hands, especially if empowered to lay it out at interest ;(s) if kept to answer the exigencies of the testator's affairs, it is excusable ;(t) but outstanding demands, even on probable grounds, are no reason why the executors should not lay their testator's money out. If laid out in the three per cents. or reduced bank annuities,(u) the court would affirm their act ; nor would they, it seems, be liable in case of a fall of stock.(v)

If a trustee lays out trust money in a fund, which the court does not adopt, (the fund it adopts is the three per cents.) and it afterwards sinks in its value, this court, though there were no *mala fides*, will throw the loss upon the trustee ; but not if laid out in the fund which the court adopts.(w)

Questions of costs depend on the conduct of the executors ;(x) and wherever there has been a general dereliction of duty, by

(n) *Raphael v. Boehm*, 11 Ves. 92. confirmed on a rehearing by Lord Eldon, 13 Ves. 407.

(o) *Dornford v. Dornford*, 12 Ves. 127.

(p) *Child v. Gibson*, 2 Atk. 603.

(q) *Lucas' Rep.* 21.

(r) *Ashburnham v. Thompson*, 13 Ves. 402. S. C. MS.

(s) *Lucas' Rep.* 141.

(t) See *Littlehales* against *Gatcoyne*, 3 Bro. C. C. 74.

(u) 16 Ves. 111. 7 Ves. 137.

(v) *Franklin v. Smith*, 3 Bro. C. C. 434. *Jackson v. Jackson*, 1 Atk. 513.

(w) *Hahcom v. Allen*, 1 Dick. 498.

(x) *Franklin v. Frith*, 3 Bro. C. C. 434.

an executor keeping funds in his hands, he will be charged with five per cent. interest, and pay costs.(y)

If an executor changes and alters the nature of a testator's estate, it has been insisted, that this is a conversion by the executor, and that as money has no ear-mark, it cannot be followed, *but the executor by such transaction makes himself liable to a *117 *devastavit*, and, in general, this is the rule; but if an executor, for the benefit of the testator's estate, should invest part of it in the funds, or should transfer the money from one particular stock, and invest it in another, this is not a conversion or appropriation by the executor of a testator's estate, but it may still be followed, as much as if it had continued in the same plight or condition as it stood in at the death of the testator.(z)

It has been said, that an executor may make use of money which is perpetually coming in by assets of the testator, and turn it to his own advantage; and that it is not improper for an executor to do it upon his own account, where he is a responsible man, and ready to answer legacies and debts when called upon;(a) but the more modern doctrine appears to be, that when a trustee has made use of the trust fund, he may be compelled by the *cestui que trust*, either to replace the fund, or to account for the advantage he has made of it, as it should appear most for the benefit of the *cestui que trust*;(b) and this, whether the trust be *public*(c) or *private*.

If a trustee sells out stock improperly, he will be decreed to replace it; and if stock be at a less *price than when sold out, *118 to invest the surplus in the same stock to the same uses,(d) or the *cestui que use* may elect to have the money for which the stock sold.(e)

If a gentleman permits a steward to make use of money in his hands, he cannot call upon him for the intermediate interest;(f) for that, it seems, is not considered as a breach of trust.

(y) *Mosley v. Ward*, 11 Ves. 581.

(z) *Waite v. Whorwood*, 2 Atk. 159. C. 41.

(a) *Adams v. Gale*, 2 Atk. 106.

(b) *Ex parte Shakeshaft*, 3 Bro. C.

C. 198.; and see *Brown v. Lipp*, 1

P. Wms. 140. S. C. 10 Mod. 20.

Massey v. Davis, 2 Ves. jun. 320.

(c) See *Lonsdale v. Church*, 3 Bro. C.

C. 41.

(d) *Earl Powlet v. Herbert*, 1 Ves.

jun. 297.

(e) *Harrison v. Harrison*, 2 Atk.

121.

(f) *Lonsdale v. Church*, 2 Ves. jun. 44.

If a trustee suffers his cotrustee to detain a sum of money belonging to the trust estate, they are both liable.(g)

An administrator *pendente lite* is not answerable for interest in respect of a balance in his hands, during the pendency of a suit in the ecclesiastical court.(h)

At law, if a trustee join in a receipt, he will be charged with the fund, because he appeared to have a power over it;(i) but, in equity, the rule is different, for if two trustees join in receipts or conveyances, and one of them only receives the money, that party is solely liable; as the other joined purely for the sake of conformity:(k) and this, though there are not negative words in the deed *creating the trust, as that, "they shall not be liable for the acts of one another;"(l) but if the sale of the estate was unnecessary, the trustee would be liable.(m)

If, however, the *cestui que trust* has notice of the breach of trust, and acquiesces, then it seems the trustee is not chargeable.(n)

It has been said, that the rule that trustees shall not be accountable for losses which happen from necessary acts, does not hold as to persons employed by the trustees, but only to the trustees themselves;(o) but it has since been determined, that where trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses.(p) If a trustee appoints rents to be paid to a banker, who fails,(q) or is *robbed*,(r) the trustee is not answerable.

So, if the testator's banker fail with moneys in his hands, the executor is not liable.(s)

(g) *Keble against Thompson*, 3 Bro. C. C. 112.

(h) *Gallivan v. Evans*, 1 Ball and Beatty, 191.

(i) *Townley v. Challoner*, Cro. Car. 312. S. C. *Bridgman*, 35.

(k) *Sadler v. Hobbs*, 2 Bro. C. C. 117. *Scorfield against Howes*, 3 Bro. C. C. 94. *Fellows v. Mitchell*, 1. P.

Wms. 81. S. C. 2 Vern. 504, 515. *Brice v. Stokes*, 11 Ves. 324.; but see

Spalding v. Shalmet, 1 Vern. 303.

(j) *Leigh v. Barry*, 3 Atk. 584.

(m) *Brice v. Stokes*, 11 Ves. 319.

(n) *Ib.* and rule approved in *Langford v. Gascoyne*, 11 Ves. 336.; and see *Trafford v. Bosham*, 3 Atk. 444.

(o) *Ex parte John de Saumarez*, 1 Atk. 87.

(p) *Belchier against Parsons*, Amb. 219.

(q) *Ib.* 3 Atk. 480. Amb. 219.

(r) *Jones v. Lewis*, 2 Ves. 241.

(s) *Rowth v. Howell*, 3 Ves. 566.

If a trustee trusts an attorney, he must abide by the effect of that confidence.(s)

If money lent by trustees, and which they were authorized to lend, be in danger, it should be called in.(t)

*If trustees, empowered to cut timber to pay debts, cut a great deal more than is necessary, this is an abuse of trust, and the produce will go according to the settlement of the estate.(u)

A trustee ought strictly to pursue the tenor of his trust, without perverting it directly or indirectly to his own personal advantage.(v)

Where an executor or trustee, instead of executing the trust as he should, by laying out the property in well-secured real estates, or upon government securities, takes upon him to dispose of it in another manner, the *cestuis que trust* may call him to an account either way, having an option to make him replace it, or, if it is for their benefit, to affirm his conduct, and take what he has sold it for; they may take that, and charge him with 5l. per cent. interest; or, if he has made more, they may charge him with that.(w) But if there has been no employment of the money, but a mere neglect to pay, he is only charged with 4l. per cent. interest, and costs;(x) if he mixes the fund with his own money at his banker's, he is chargeable with 4l. per cent.(y) and perhaps more.(z) but an executor is not chargeable with *interest for a balance in his hands, retained *121 under a fair misapprehension of his right to it.(a)

A trustee is only answerable for fraud or a gross neglect, which is equal to fraud; and, therefore, where trust money is suffered by a trustee to remain in the hands of A. with the privity and approbation of the parties beneficially interested, in-

(s) Chambers v. Minchin, 7 Ves. Ib. in note, to p. 809. Piggy and Stagg, 196. and vid. Jones v. Lewis, 10 Ves. 4 Ves. 620. Newton and Bennet, 1 Bro. 248. C. C. 350.

(t) Payne v. Collier, 1 Ves. jun. 170.

(x) Rooke v. Hart, 11 Ves. 61.

(u) Tully v. Tully, mentioned 3 Ves. 378.

(y) Parkin v. Bagnton, 1 Bro. C. C. 375.

(v) Richardson and Chapman, 7 Bro. P. C. 324. Toml. edit.

(z) See *ex parte* Hilliard, 1 Ves. jun. 90. and see Treves and Townsend, 1 Bro. C. C. 385. and Roche v. Hart, 12 Ves. 61.

(w) See Treves against Townsend, 1 Bro. 382. Rostock v. Blakeney, 2 Bro. C. C. 653. Pocock v. Redding, 10 Ves. 794. and Long and Steward, 386.

(a) Brayers v. Pemberton, 22 Ves. 386.

instead of laying it out in a purchase, pursuant to marriage articles, and *A.* becomes insolvent, the trustee is not in this case answerable. (x)

Where a trustee represented that money was invested in stock, though, in truth, it was not, he was charged upon the same principle as if he had sold out stock and used the money. (a)

Though no *fraud* is imputed to trustees, and no kind of interest or benefit to themselves in their negligence, yet they are answerable. If it were otherwise, it would be an encouragement to bad motives, and it might be impossible to detect undue motives; (b) but the Lord Keeper *North* said, it must be a very supine negligence, to render a trustee liable. (c)

If an executor has administered, though without proving the *122 will, a renunciation afterwards *is void, (d) and he will be charged with all the subsequent receipts of his co-executor; (f) but in another case it was held, that an executor may join in the probate with his co-executor, and does not by that, and by permitting the other executor to possess assets, make himself answerable for the receipts of the other. (g)

Where one executor receives the whole or part of the testator's estate, and pays it over voluntarily and unnecessarily to his co-executor, and the same is embezzled or lost, he who so paid it over is answerable with the other, (h) unless he can assign a sufficient excuse; (i) but, it seems, he is not answerable where he is merely passive, by not obstructing the other in receiving it, (k) and does not himself concur in the application of it. (l)

If an executor living in *London* is to pay debts in *Suffolk*, and remits money to his co-executor to pay these debts; he is considered to do this of necessity, and he would not be respon-

(x) *Allen v. Hancorn*, 7 Bro. P. C. 375. Toml. edit.

(a) *Bate v. Scates*, 12 Ves. 402.

(b) *Caffrey v. Darby*, 6 Ves. 495, 6.

(c) *Palmer v. Jones*, 1 Vern. 144.

(d) *Rowth v. Howell*, 3 Ves. 566.

(f) *Read v. Trustlove*, Amb. 417.

(g) *Hovey v. Blakeman*, 4 Ves. 607.

(h) *Townshend v. Barber*, 1 Dick.

356. *Gill v. Attorney General*, Hard.

314. *Sadler v. Hobbs*, 2 Bro. C. C. 114.

Chambers v. Minchin, 7 Ves. 186.; and

see *French v. Hobson*, 9 Ves. 103.

(i) As in *Bacon v. Bacon*, 5 Ves.

331. approved, 7 Ves. 193. *Lord Ship-*

brooke v. Lord Hinchinbrooke, 11 Ves.

252.

(k) *Langford v. Gascoyne*, 11 Ves.

335.

(l) *Hovey v. Blakeman*, 4 Ves. 607.

able for a misapplication.(m) It would be the same, were one executor in *India* and another in *England*, the assets being in *India*, but to be *applied in *England*; the executor in *India* *123 would not be responsible if he remits to the executor in *England*.(n)

If two executors join in receipts and conveyances, and one only receives the money, yet both are liable to creditors,(o) but not to legatees,(p) because it is not necessary for conformity, that all the executors should join in giving a receipt, as it is in the case of trustees.(q)

An administrator is not, in every case, chargeable with interest on account of personal estate.(r)

Executors ought not, without great reason, to permit debts due upon personal security to remain longer than is absolutely necessary, especially where infants are concerned.(s) If they neglect to call in money due on bond, they will be liable.(t)

Though an executor may invest money in real securities, he will yet be liable in case *of a loss, if there was ground, at the *124 time, to suspect it.(u)

If trustees are authorized to lay out money upon government or real securities, or personal property, the court, in many instances, will say they shall choose the best. If personal property is out upon hazardous securities, the trustees will be controlled by the court, and their discretion will be controlled if it is shown to be mischievously and ruinously exercised.(v)

Where trustees are empowered to invest money, till a purchase of lands can be found, in government funds, or other good securities; this does not warrant them in laying out the money

(m) See *Joy v. Campbell*, 1 Sch. and Lefr. 341.

(n) *Id.* 342.

(o) *Sadler against Hobbs*, 2 Bro. C. C. 117. *Brice v. Stokes*, 11 Ves. 324, 5. *Chambers v. Michin*, 7 Ves. 198; but see what is said in *Hovey v. Blakeman*, 4 Ves. 608. and in *Westly and Clarke*, 2 vol. Dick. 329.—S. C. mentioned in note to 1 P. Wms. 83. and *Joy v. Campbell*, 1 Sch. and Lefr. 341.

(p) *Churchill v. Lady Hobson*, 1 P. Wms. 241.; but see note to that case, note 2.

(q) See *Westly and Clarke*, mentioned in note to 1 P. Wms. 83. and 1 Dick. 330. *Leigh and Sney*, 3 Atk. 584. *Belchier against Parsons*, Amb. 219.

(r) *Wilkins v. Hunt*, 2 Atk. 151.

(s) *Powell v. Evans*, 5 Ves. 844.

(t) *Lowson v. Copeland*, 5 Ves. 156.

Powell v. Evans, 5 Ves. 809.

(u) *Brown v. Little*, 1 P. Wms. 140.

(v) *De Musneville v. Greshamton*, 1 Ves. and Ben. 356.

in *South Sea stock*, or in *bank stock*, for, by so doing, losses may be occasioned; but they are justified in laying it out in *South Sea annuities*, and *bank annuities*, for, in such case, no loss can happen. (w)

If *A.* gives legacies, and makes *B.* his executor, and *B.* receives the assets, and buys land with the money, and dies, the court, on a bill by legattees, to be paid their legacies out of *B.*'s real and personal estate, will direct an inquiry, whether part of the assets were laid out in the purchase of an estate, and if they were, that they ought to be restored to the testator's personal estate. (x)

- *125 Where trust money can be traced into a purchase of land, the land in general is liable, and a claim of that nature may be supported by parol evidence; (y) for where a man is bound to do an act, and he does what may enable him to do the act, he will be supposed to do it with the view of doing that which he was bound to do. (z)

Where, however, a trustee for the purchase of land died without personal assets, but had purchased land, the estates purchased were held not liable to the trust; the circumstances of the case affording no presumption that they were purchased in execution of the trust. (d)

A trustee is not answerable for having applied the trust property, even to what turned out a losing adventure, if done without fraud or negligence. (e)

If a trustee engages an infant's name in an adventure, but being afraid of the double and unequal risk of answering in one case for all the profit, and in the other for all the loss, does not embark the infant's property, he is not answerable. (f)

- *126 If a trustee has engaged the trust property in an adventure, he cannot sell either to himself or another. (g)

(w) *Trafford v. Boehm*, 3 Atk. 444.

(x) *Ryall v. Ryall*, 1 Atk. 58; S. C. Amb. 413; and see *Deg v. Deg*, 2 P. Wms. 414.

(y) *Lench v. Lench*, 40 Ves. 517; S. C. M. S. Lane v. Dighton, Amb. 408; but see *Headar v. Milward*, 2 Vern. 440; S. C. Prec. Ch. 172; and *Ryall v. Ryall*, 1 Atk. 59.

(z) *Sowden v. Sowden*, 1 Brb. C. C. 582; and see 10 Ves. 582.

(d) *Perry v. Phillips*, 4 Ves. 208. and 17 Ves. 173.

(e) *Wilkinson v. Stafford*, 1 Ves. jun. 41.

(f) *Ib.* 42; but see contra, *Merceton Eden's case*, house of lords.

(g) *Wilkinson v. Stafford*, 1 Ves. jun. 42.

An executor cannot renew a lease for his own benefit, and the *cestui que trust* may have relief against him or a purchaser, with notice.^(k) Whenever a mortgagee, executor, trustee, or tenant for life, gets an advantage, by either being in possession or behind the back of the party, mortgagor, *cestui que trust*, or remainder-man, he is not allowed to retain the same for his own benefit; but will be considered as holding it in *trust*; the new lease in any of those cases being considered as a graft upon the old one.^(l) Where a *tenant-right* estate, as it is called, is settled upon marriage, the renewal is to the use of the settlement.^(m)

The principle seems to have been carried farther in *James and Dean*⁽ⁿ⁾ than in any former case. A bequest was made of leaseholds for years determinable upon lives, for life, with remainder over for all the residue of the term and interest the testator shall have to come therein at his decease. The term expired in the life of the testator, who continued to hold, and paid half a year's rent before his death, as tenant *by the year; *127 and it was determined, that a subsequent lease obtained by the executrix, the widow and tenant for life under the will, should be held subject to the uses of the will, and as the residue of the term at his death, however short, would have been.

If a mortgagee of a renewal term gains a new term, to commence after the old one, this new term will be subject to the old equity of redemption.^(o)

If a trustee buys in an encumbrance, he is allowed no more than what he really paid for it.^(p)

Trustees not having renewed leases, as they ought to have done, are answerable as for a breach of trust.^(q)

A renewable lease has been held not to be inconsistent with a

(k) *Walley v. Walley*, 1 Vern. 284.

(l) *Pickering v. Vowler*, 1 Bro. C.

(i) *Nesbit v. Tredeanick*, Ball and Beatty's Irish Rep. 1 vol. 46. *Rawe v. Chichester*, Amb. 719. *Holt v. Holt*, 1 Ch. Ca. 190, which seems to be the oldest case. *Owen v. Williams*, Amb. 734.

C. 197.

(j) 15 Ves. 236.

(m) *Rakestraw v. Brower*, 2 P. Wms. 511.

(n) *Darcey v. Hall*, 1 Vern. 49.

(o) *Lord Mountfort v. Lord Cadogan*, 17 Ves. 465.

covenant by a trustee for creditors, to let and manage to the best advantage.(p)

If a trust fund is created by will, to be laid out in the purchase of lands, it is a breach of trust to lay any of it out in building a house and making improvements on lands purchased.(q)

- *128 It has been held, that if an executor has a lease for years determinable upon the life of *J. S.* which is by a reasonable estimate worth 200*l.* if the executor does not sell it, but keeps it, and **J. S.* dies in a short time, he will be liable to answer the value of it at the time of the death of the testator; he being in fault not to sell it. On the other hand, if he should keep the lease, and *J. S.* should live fifty years, he shall answer for no more, because here is a contingent gain; and it might have been a loss; and as, if it had been a loss, he must have borne it; so, being a gain, he shall receive it.(r)

If an executor takes the advice of a *lawyer* in what he does, the court, it seems, will not charge him for misconduct.(s) And if an executor, without application to the court, does what the court would have approved, he will not be called to account, and forced to undo that, merely because it was done without application.(b)

If a legacy be payable at twenty-one, the interest being given for maintenance, the executor is not *at liberty* (unless the legacy be very small)(c) to make *advancements of the principal* during the *infant's* minority; but if, after he comes of age, the payments are admitted as a satisfaction of the legacy, it cannot be claimed.(d)

If one trustee knows and conceals his cotrustee's sale of the trust fund, he is equally liable with the trustee who actually sold.(e)

- *129 Executors, in whose names moneys have been *invested, are chargeable for negligence by joining in a transfer to a co-exe-

(p) *Kirkham v. Chadwick*, 13 Ves. 467. (e) *Barlow v. Grant*; 1 Vern. 255.
 (q) *Bostock against Blakeney*, 2 Bro. C. C. 668. (d) *Lee v. Brown*, 4 Ves. 322.; and see *Davis and Anston*, 1 Ves. jun. 247. S. C. 3 Bro. C. C. 173.
 (r) *Phillips v. Phillips*, 3 Freem. p. 12. (e) *Boardsman against Mosman*, 1 Bro. C. C. 68. Lord Shipbrooke v. Lord Hinchinbrooke, 16 Ves. 477.
 (s) *Ves v. Emery*, 5 Ves. 144.
 (b) *Lee v. Brown*, 4 Ves. 369.

tutor, upon his representation that it was required for debts; but not liable so far as they can prove the application to that purpose; though he possessed other funds, not through them, which funds he wasted.

If an executor or trustee compound debts or mortgages, and buy them in for less than is due thereon, they will not be permitted to take the benefit of it themselves; but other creditors or legatees will have the advantage of it; and for want of them, the benefit goes to the party who is entitled to the surplus; (f) but if the composition appears to have been made for the benefit of the trust estate, it is an excuse. (g)

The court of chancery has jurisdiction to remedy the abuse of a charity in the management of its revenue by the governors; (h) and this, though the heir of the founder and the visitor, is one of the governors. (i)

A corporation having a power over an estate devoted to charitable uses, will, in the same manner as in the case of an individual, be prevented acting corruptly in the execution of their trust. (k)

A long lease of a charity estate is, *prima facie*, *considered *130 as a breach of trust, (l) and remediable as such, in chancery; and the proof of the circumstances that evince it a provident administration of the trust is thrown upon those who take such a lease.

Where charity lands have been let at a great undervalue, the lease has been set aside, and the lessee decreed to pay the arrears of rent according to the full value of the land, and to deliver up the possession. (m)

A farm lease with the common husbandry covenants cannot be granted by trustees for a charity for ninety-nine years, or a term of much less duration, but it must be for the usual term, upon such a lease. (n)

(f) See note A. to 3 P. Wms. 251: Salk. 155.

(g) *Blas v. Marshall*, 3 P. Wms. 381.

(h) *Kirkby v. Ravensworth Hospital*, 15 Ves. p. 314.

(i) *Attorney General v. Dixie*, 13 Ves. 519. See the decree in this case, which appears to have been very carefully drawn.

(k) *Dummer v. Corporation of Chippenham*, 14 Ves. 252.

(l) *Vid. Attorney General v. Griffith*, 13 Ves. 565; and see p. 550. *Attorney General v. Owen*; 10 Ves. 555. *Attorney General v. Green*, 8 Ves. 452.

(m) *Beresby v. Farrer*, 2 Vern. 414.

(n) *The Attorney General v. Owen*, 10 Ves. 558.

So, where a testator directed a new trustee to be appointed, if either of those he had appointed trustees should die, or become incapable of acting, and one of the trustees had absconded on a charge of forgery; it was referred to the master to approve of a new trustee. (b)

The court will not, unless with the consent of all parties, *134 change a mere trustee for a wife *under a marriage settlement, without sending it first to the master to see if the person proposed is a proper person. (c)

One of the three trustees under an act of parliament being gone abroad, and having released, there being no provision for the change of trustees, upon a bill, it was referred to the master to appoint a new trustee. (d)

If trustees die, the court will appoint new trustees. (e)

Where the office of the trustees is not confined to any personal qualification, but what any body might do, such as to see what timber is fit to be cut, the court, if the trustees die, will execute the trust. (f)

If a trustee has the power of appointing a new trustee with a more extensive interest, the court will not prevent the exercise of his discretion; but will take care that it shall be duly exercised. (g)

CHANCERY PRACTICE.

Having endeavoured in the preceding pages to give a systematic view of the grounds on which bills may be filed, and the principles which influence the chancellor in the exercise of his *135 *equity jurisdiction, it remains to give a concise statement of the rules relating to the practice of the equity side of the court of chancery.

A suit in equity is commenced by the filing of a bill. If the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as the objects of a public charity, the matter of com-

(b) *Milford v. Eyre*, 2 Ves. jcs. 94.

(c) *O'Keefe v. Galthorpe*, 1 Atk. 18.

(d) *Buchanan v. Hamilton*, 5 Ves. 722.

(e) See *Hibbard against Lamb*, Amb. 309.

(f) See *Hewit v. Hewit*, Amb. 508.

(g) *Webb v. Earl of Shaftesbury*, 7 Ves. 467.

plaint is offered to the court by way of information *(h)* but it differs very little from a bill *(i)*

If the suit immediately concerns the right of the crown, no relator is necessarily named; but, where it does not immediately concern the right of the crown, a relator is named who may be liable to costs. If the relator has an interest in the suit, it is termed an information and bill *(k)*. The bill is usually described as consisting of nine parts. The first part contains the address of the bill to the person or persons, *lord chancellor, lord keeper, or lords commissioners*, holding the great seal. If the seal be in the king's hands, or if the chancellor is defendant, the bill must be addressed to his majesty. The second part consists of the names of the plaintiffs, and their descriptions. The third is called the stating part of the bill, and contains the plaintiff's case. In the fourth place, is a general charge of confederacy. The fifth part consists of allegations of the defendant's pretences, and charges in evidence of them. In the sixth part of the bill, there is an averment that the acts complained of are *contrary to equity*, and that a court of equity alone can afford relief. The seventh part, consists of a prayer that the parties may answer the premises. *136

The prayer of the relief sought by the bill, forms the eighth part. In the ninth part is a prayer of process.

Many different kinds of bills have been already treated of. Those bills which become necessary to be instituted in the course of a suit, to carry into effect a previous bill, will be treated of as we proceed, and according as they arise in the progress of the suit. These are usually called "bills not original;" but might, perhaps, with more of meaning, be termed *secondary bills*.

The bill must be signed by counsel *(l)* and if it appears in any stage of the suit, that the bill was not so signed, it will be

(h) Mitford's Pleadings, 7.

(i) Ib. 21. 98.

(k) 4 Bro. C. C. 38.

(l) The framing of bills is the province of the junior counsel. It is of vast importance, and requires great knowledge and judgment. In no other science is

so much expected from the younger members. In all perplexed and difficult questions, it is prudent to have the opinion of some senior counsel upon the fitness of the bill for its intended purpose; it may ultimately save much expense and disappointment.

ordered to be taken off the file, and the plaintiff to pay the costs.(m)

Pleadings often run into a great deal of unnecessary verbiage,(n) and bills are seldom comprised in so few as fifteen sheets; the length prescribed by an order of Lord Bacon.

- *137 Formerly, the bill contained *very little more than the stating part, with a simple prayer, that the defendant might answer the matters contained in it, and then came the prayer for relief.

The interrogatory part had its birth before the charging part. Lord K'nyon, in the bills he drew, when at the bar, never put in the charging part; which does little more than unfold and enlarge the statement.(p) If there is nothing in the prior part of the bill to warrant an interrogatory, the defendant is not compellable to answer it;(q) but under a general charge, as of the fact of payment of money, the plaintiff may interrogate as to all the circumstances that go to prove or disprove the truth of the fact; as *when, where, &c.* without particular charges;(r) but he cannot interrogate as to a distinct subject, as to which there is no allegation in the bill.(s)

But though the rule is that you are not only to question in the interrogatory part, but make charges in the charging part, otherwise no exception can be taken; yet, if the defendant, though not bound to answer, has done so, and this is replied to, it is effectively put in issue.(t)

The plaintiff's equity must appear in the stating part of the bill.(u)

- *138 *The charge of *confederacy and combination* of the defendant, with others, is usual in bills; unless they are amicable bills;(w) but seems unnecessary, and is improper, where a peer is defendant.(x)

(m) French v. Dear, 5 Ves. 547. 273; and see Jerrard and Saunders, 4 Dillon v. Francis, 1 Dick. 68. Bro. C. C. 458.; and Mucklestone v.

(n) 1 Ves. jun. 450. Browne, 6 Ves. 62, 3.

(p) Partridge v. Haycraft, 11 Ves, 574, 5. (r) Attorney General v. Whorwood, 1 Ves. 538, 9.

(q) Mitford's Pleadings, 44. (s) Fleet v. Field, 2 Amstr. 543.

(t) Faulder v. Stuart, 11 Ves. 301, 302. (w) Wyatt's Prac. Reg. 141.

(x) Mitford's Pleadings, 40, 42.

(r) Bullock v. Richardson, 11 Ves.

Bills always state, that the party is *remediless by the rules of the common law*; but this need not be true in every instance: in those cases, for instance, where the common law courts have assumed a jurisdiction which courts of equity alone had before. For a great while, courts of law would not assist a man who could not make *profero*; but as the debt existed, though the party could not comply with the requisites to support an action, a bill in equity might be filed, calling upon the party either to admit the bond, or give him an opportunity of proving the execution and the loss, and a court of equity always interfered. But of late, courts of law have, from the hardship, waived that rule, and permitted a man to declare upon a lost bond (y) but Lord *Thurlow* held, this new doctrine would not take away the equitable jurisdiction (z).

Formerly, it appears to have been thought sufficient if the bill contained only a prayer for *general relief*; (a) which Mr. *Robbins*, an eminent counsel, used to say, was the best prayer next to the *Lord's prayer*; (b) but the practice now is, to pray *139 *particular relief*, though, if the particular relief prayed by the bill cannot be given exactly as prayed, the court will assist the particular prayer, under the general prayer; (c) but relief inconsistent with the specific relief prayed cannot be given under the general prayer; (d) unless in the case of an *information* by the *attorney general* suing on behalf of a charity, (e) or where a bill is filed by an *infant*, (f) who may have a decree upon any matter arising upon the state of his case, though he has not particularly insisted upon and prayed it by his bill. But a bill may be framed with two different aspects, so that if, in one view of the case, the relief prayed fails, the other may be sustained. (g)

(y) See ante, 1 vol. p. 22. etc. *Reed* and *Brookman*, 3 T. R. 151.

(z) *Toulmin v. Price*, 5 Ves. 438.

(a) *Cook v. Martyn*, 2 Atk. 2. I have heard the late Mr. Lloyd very strenuously defend this position.

(b) See 1 Atk. 3. and 3 Atk. 132.

(c) *Beaumont v. Boulthbee*, 5 Ves. 495.

(d) *Lord Walpole v. Lord Orford*, 3 Ves. 416; and see *Grimes v. French*, 2 Atk. 141.

(e) *Attorney General v. Jones*, 1

Atk. 365. *Attorney General v. Whiteley*, 11 Ves. 247. *Attorney General v.*

Farker, 1 Ves. 43. *Attorney General*

v. Smart, 1 Ves. 72. *Attorney General*

v. Breeton, 2 Ves. 426. *Attorney General*

v. Scott, 1 Ves. 418.; and see

what is said in *Attorney General v.*

Jackson, 11 Ves. 367.

(f) *Stapilton v. Stapilton*, 1 Atk. 6.

(g) As in *Mpcklestone and Browne*,

6 Ves. 52.; see *Bennet v. Vade*, 2 Atk.

325.

The concluding prayer of the bill is that process may issue, requiring the defendants to appear to and answer the bill; and if an injunction, or a writ of *ne exeat regno* is necessary, or if any defendant has privilege of peerage, or is a lord of parliament, a prayer for that purpose; or for a letter *missive*, before the prayer of process, is necessary; and in case the attorney

*140 general, "as an officer of the crown, is a defendant, instead of praying process against him, the bill must pray, that he may answer it, upon being attended with a copy.

Suits are generally prosecuted and defended by parties in their own names only; though by leave of the court it may be done by others; as by *prochein-amys*, where a *feme covert* sues her husband, in respect of her separate property, (a) or he is exiled; or has abjured the realm; or by a *guardian*, or *next friend*; in the case of *infants*; or by committees, on behalf of *lunatics* or *idiot*s. An information at the relation of a lunatic is not proper; he, or some person on his behalf, must be a party. (b)

The *prochein amy* need not be a relation, but must be a person of substance, because liable to costs. (c)

So, a suit may be intituled either in the party's own right, or in right of another, or in both their rights: of the first sort, are most suits in chancery; and of the second kind, are suits by executors, administrators, trustees, &c.; and of the last sort, are suits by baron and feme, for lands, &c. in right of the wife.

A trustee may in some cases bring a suit in his own name only; (d) as where one trustee seeks relief against a cotrustee, for a breach of trust; (e) but, ordinarily, the *cestui que trust*, where the bill is for an execution of the trust, should be made a party. (f) On a bill filed by a *cestui que trust*, the trustee is not necessarily a party; (g) but in general, it seems, they are made parties. (h)

Two plaintiffs cannot join in one bill, where their interests are several; and a bill containing things of distinct natures;

(a) *Lady Ellbank v. Montolien*, 5 Ves. 743.

(b) *Attorney General v. Bucknall*, 2 Atk. 328.

(c) *Asen*, 1 Atk. 570.

(d) *Toth*, 225, 2 Atk. 48.

(e) *Franco v. Franco*, 3 Ves. 75.

(f) *Hanne v. Stevens*, 1 Vern. 110.

Kirk v. Clarke, Prec. Ch. 275. *Adams*

v. St. Ledger, 1 Ball and Beatty, 184.

(g) *Kirk v. Clarke*, Prec. Ch. 275.

(h) 1 Eq. Abr. 72. 2 Bro. C. C.

225, 7 Ves. 3.

brought against two or more persons, is demurrable. . . But in a bill for tithes, several parishioners may be made defendants to the bill, because the demand against them is of the same nature; and sometimes, for avoiding multiplicity of suits, and to bring all parties who may be affected before the court, the suit is by or against divers parties, who have separate rights or interests, as devisees, creditors, and the like.

By motion, of course, the plaintiff or defendant may add parties before answer: and on cause shown, any time before publication, the court will suffer the plaintiff to add parties to his bill, and without costs; if there be no plea, &c. So, after publication, before hearing, and after a decree, before it is enrolled, parties may on the petition be added.

But if a defendant be added after publication, the cause as to such defendant must be heard on the bill and answer only. (f)

**Parties to a Bill.*

*142

A material consideration in the framing of bills is, that there be all necessary parties. If on the face of the bill it appears that there are not sufficient parties, a *demurrer for want of parties* will lie; but where it does not appear on the face of the bill, a *plea of want of parties* may be resorted to, or an objection may be taken at the hearing (k) of the cause; but in such case the bill is not dismissed, as Sir J. Jekyl thought it should; (l) but the cause will be ordered to stand over upon paying the costs of the day; (m) the usual order being to "let the cause stand over, with liberty for the plaintiff to amend the bill by adding parties." (n)

An objection, by way of exception to the master's report for want of parties, is too late; the objection ought to have been made at the hearing. (o)

Where it appeared on an *appeal* from a decree at the rolls, that parties were wanting, Lord Thurlow ordered the cause to

(f) Jacob's Ch. Prae. 320.

(m) Anon. 2 Atk. 14. Jones v. Jones,

(k) Darwent v. Walton, 2 Atk. 510.

3 Atk. 110. S. C. 1 Dick. 96.

(l) See Stafford v. City of London, 1 P. Wms. 429.; but this decree was reversed by Lord King, James and Jones, 3 Atk. 110.

(n) Windsor v. Windsor, 1 Dick. 707.

(o) Wakeman v. Duchess of Rutland, 3 Ves. 234.

stand offer, with liberty to the plaintiff to file a supplemental bill merely to add parties.(p)

It is observable, however, that if a plaintiff, on the hearing of the cause, waives the relief he prays against a person, it does
 *143 away the objection for want of making such person a party;(q) and if he agrees to dismiss his bill as against a person unnecessarily made a party, it does away the objection on account of such unnecessary party, and the cause may proceed against other defendants.(r)

Merely naming a party in a bill as a defendant does not make him a party, unless process is prayed against him.(s)

Though the cause be brought on to a hearing, even then, if necessary, the plaintiff may amend his bill, and add a party.(t)

Even where the cause had been heard, and a decretal order made, liberty has been given, not to amend for want of parties, but to bring a supplemental bill, in which the necessary parties might be brought forward;(u) but a plaintiff cannot put off a cause for defect of parties, *without consent, or a special ground*; as that he was not aware of the existence of such parties.(v)

The general rule as to parties is, that where a bill is brought for relief, (it is otherwise where a discovery only is sought),(w) all persons materially interested in the subject of the suit, however numerous, ought to be parties;(x) in order to prevent multiplicity of suits,(y) and that there may be a complete decree between all parties having material interests; but this being a general rule, *established for the convenient administration
 *144 of justice, is subject to some exceptions, introduced from necessity, or with a view to practical convenience. Thus, where persons interested are out of the jurisdiction of the court, and it is stated so in the bill, and proved,(z) it is not necessary to make them parties. And though in these cases the court

(p) Holdsworth v. Holdsworth, 1 Dick. 799.

(q) Pawlet v. Bishop of London, 3 Atk. 295.

(r) Wicks v. Marshall, 3 Atk. 490.

(s) Windsor v. Windsor, 2 Dick. 797.

(t) East-India Company v. Neave, 5 Ves. 185.

(u) Jones v. Jones, 3 Atk. 170.

(v) Innes and Jackson, 18 Ves. 356.

(w) Sangha and East-India Company, 2 Eq. Abr. 170.

(x) See on the subject Knollys v. Alcock, 1 Ves. 263.

(y) See 2 Atk. 54.

(z) Travers v. Buckley, 1 Ves. 385.

Gowland v. Getty, 1 Vern. 346; and see 2 Vern. 320; Dardant v. White, 2

Atk. 510. Prec. Ch. 83.

cannot compel them to do any act, but it can proceed against the other parties : and if the disposition of the property is in the power of the other party, the court may act upon it.(a)

Where an executor was outlawed, and a witness proves he has inquired after, and could not find him, it is not necessary to make him a party.(b)

If an executor goes out of the kingdom, even to Scotland, it seems that, by virtue of the act,(c) an administrator may be appointed to become, and be made a party to a bill or bills in equity, and to carry the decree or decrees into effect ; but if the executor returns pending the suit, he must be made a party, and the administrator (his costs being paid) has nothing more to do with the suit.(d)

So, in a suit on behalf of a charity, for the arrears of a rent charge, it is not necessary to *make all the terretenants of the *145 land out of which the rent issues, parties.(e)

So, where the parties are very numerous,(f) as in the several cases of the *Water Works Company*,(g) the *New River Company*,(h) *Drury Lane Theatre*, and the other theatres ;(i) the *Philanthropic Society Institution*,(k) and others of the kind,(l) the court has permitted a few to sue on behalf of themselves and the others. Where a legal body acts by committees, it is enough to consider a contract as made with those who think proper to undertake, looking to the body for which they undertake for indemnity ; and plaintiffs at law cannot be nonsuited, nor can they defend an action against them, upon that ground.(m)

The cases of creditors suing on behalf of themselves and others,(n) and also of persons entitled to prize money,(o) or part

(a) *Smith v. Hibernia Company*, 1 Sch. and Lefr. 240. *Williams v. Whinnyates*, 2 Bro. C. C. 399. ; but see *Fell and Brown*, 2 Bro. C. C. 277.

(b) *Heath v. Percival*, 1 P. Wms. 684.

(c) 38 Geo. III. c. 87.

(d) *Rainsford v. Taynton*, 7 Ves. 468, 9.

(e) *Attorney General v. Wyburgh and others*, 1 P. Wms. 599.

(f) See *Prag. Ch.* 592.

(g) 2 Vern. 420.

(A) 11 Ves. 429.

(i) See *Moffat against Farquharson*, 2 Bro. C. C. 338.

(k) 16 Ves. 921.

(l) See *Pearce and Piper*, 17 Ves. p. 1. and *Lloyd and Loaring*, 6 Ves. 779.

(m) *Cousins v. Smith*, 13 Ves. 544. ; and see *Cullen and Duke of Queensbury*, 1 Bro. C. C. 101.

(n) *Leigh v. Thomas*, 2 Ves. 313.

(o) *Good and Blewett*, 13 Ves. 397. ; and see *Brown and Harris*, 13 Ves. 397.

of the parishioners filing a bill for themselves and the other parishioners, to establish a *modus*, form also, from necessity, exceptions to the general rule. But where all the parties to a vestry order were not made parties to a bill for the payment of money allowed by the order, the court refused to make a decree. (p)

- *146 *A *residuary legatee* filing a bill must, in general, bring before the court all persons interested in the residue; but that is dispensed with where it is not important or convenient that they should be before the court. (q)

It is also established, that in the case of persons interested in *real estates*, it is sufficient that a plaintiff, making claims relative to such estates, bring before the court the first tenant in tail in being, and, if there be no tenant in tail in being, the first person entitled to the inheritance. (r) But in all these cases, persons interested, but not made parties, have opportunities given them, during the progress of the suit, of supporting their interests; the court being always open to them as to questions upon the management of the suit, applications for a rehearing, &c. (s)

- It is a rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree; for this reason a *residuary legatee* need not be made a party, nor a bankrupt, in a suit brought against assignees of his estate. (t)
- *147 but if a bill is brought for the *discovery* of a bankrupt's estate, the bankrupt may be made a party. (u)

So, also, persons ought not to be made parties, who may be examined as witnesses, and against whom no relief is prayed; and such unnecessary party may demur or plead, as the case requires: (v) the *exceptions* to this rule are, in the case of *agents*

(p) *Henchman v. Ayer*, Hard. 333, Com. Dig. tit. Ch. E. 2.

(q) See *Bradwin* against *Harper*, Amb. 375.

(r) *Leonard and Sussex*, 2 Vern. 527.

Giffard v. Hort, 1 Sch. and Lefr. 408. *Fletcher v. Tollit*, 5 Ves. 10. *Lloyd and Johns*, 9 Ves. 58. *Reynoldson* against *Perkins*, Amb. 564. S. C. 1 Dick. 427. *Cockburn and Thompson*, 16 Ves. 327. *Finch v. Finch*, 2 Ves. 493.

(s) *Cockburn v. Thompson*, 16 Ves. 327.

(t) *De Golls and Ward*, mentioned in note I. to 3 P. Wms. 311.

(u) *Sharpe v. Gamon*, 2 Vern. 32; but, see 1 Ves. and Bea. 550.

(v) *Plummer v. May*, 1 Ves. 426; and see 2 Bro. C. C. 252, 332. 2 Ves. jun. 464. 6 Ves. 143. and 7 Ves. 287.

to a corporation, (u) and of arbitrators, (x) and attorneys who have fraudulently prepared deeds sought to be set aside. (y)

In general, where a bill is filed for equitable relief as to a *rent charge*, all the persons whose estates are liable, must be brought before the court, that complete justice may be done; and the question tried in the presence of all who are interested, and may have claims to contribution among them. (u) But there are exceptions to this rule; as where it is impracticable, or so inconvenient as to be almost impracticable; (b) and there seems a difference, where the rent charge is claimed by a *charity*; (c) as before observed.

If a bill be filed to establish the plaintiff's right to demand service from the individuals of a large *district, to his mill, it is not necessary to make all the inhabitants parties, that being impracticable. (d) *148

To a bill by the assignee of a judgment, the assignor is a necessary party. (e)

A relator who has *some interest* is a necessary party to an information; (f) but he need not be the person principally interested. (g)

If a voluntary society be entered into, with an intention to provide, by a weekly subscription, for such of the members as should become necessitous, and their widows, it is in the nature only of a *private charity*, and it is not necessary that the attorney general should be a party. (h)

An administrator, though *insolvent*, must be made a party to a bill for a discovery of assets; (i) but a bill for a discovery of real assets may be brought against an heir, in order to preserve a debt, without making an administrator of the personal

(u) Wych v. Mead, 3 P. Wms. 310.
Plummer v. May, 1 Ves. 426. Le
Texier v. The Margravine of Anspach,
15 Ves. 164.

(x) Dummer v. Corporation of Chip-
penham, 14 Ves. 152.

(y) Bennett v. Vade, 2 Atk. 308.
Stewart v. East-India Company, 2 Vern.
380. 1 Sch. and Lefr. 227.

(e) Attorney General v. Jackson, 11
Ves. 377.

(b) *Ib.*; and see Adair v. New River
Company, 11 Ves. 429.

(c) Attorney General v. Jackson, 11
Ves. 365.

(d) Adair v. New River Company,
11 Ves. 444, 5.

(e) Cathcart v. Lewis, 1 Ves. Jun.
463.

(f) Mit. Pl. 60, §1.

(g) Attorney General v. Buckall, 4
Atk. 328.

(h) Anon. 3 Atk. 277.

(i) Ashurst v. Eyre, 3 Atk. 51.

estate a party, where it is suggested, that the representation is contesting in the ecclesiastical court. *(k)*

Trustees, parties to a suit, will not be allowed to change the trustees under a power for that purpose, without the authority of the court: *(l)* and the court will restrain them upon a motion for that purpose.

- *149 . *If *A.* having outlawed *B.* brings a bill against *B.* and *C.* a trustee for *B.* with respect to an annuity, and to subject the same to the plaintiff's debt, the *attorney general* ought to be made a party; and the plaintiff must get a lease or grant in the court of exchequer from the crown. *(m)*

If a bill is brought to establish a general *modus* through a whole parish, all the land owners must be either plaintiffs or defendants; but if the plaintiff sues for tithes in kind, the defendant may insist upon such *modus*, though the rest of the parishioners are not made parties. *(n)*

Though a *modus* be laid in all the occupiers, yet each is liable for the whole, so that suing a part of the occupiers is sufficient. *(o)* Where a rector's or an impropriator's right does not come in question, he need not be made a party to a bill brought for subtraction of tithes. *(p)*

To a bill to establish a customary payment in lieu of tithes, the *ordinary* must be a party. *(q)*

If there be a mortgage by a tenant in fee, who creates a term for that purpose, it is not necessary that, on a bill of foreclosure, the personal representative should be made a party. *(r)*

- *150 If the heir of a mortgagee brings a bill to foreclose, the executor of the mortgagor must be made a party; *(s)* and if the heir of the mortgagor brings a bill to redeem, the executor or administrator of the mortgagee must be made a party. *(t)* The heir need not be a party to a bill by a devisee to redeem. *(u)*

(k) Plunket v. Penson, 2 Atk. 51.

(l) Earl of Shaftesbury v. Arrow-smith, 7 Ves. 487.

(m) Balch v. Waftall, 1 P. Wms. 445; and see — v. Bromley, 2 P. Wms. 269. Parker's Rep. 268.

(n) Rudge and Hopkins, 2 Eq. Abr. 170.

(o) Hardcastle v. Smithson, 3 Atk. 247.

(p) Carter v. Ball, 3 Atk. 500.

(q) Gordon v. Simkinson, 9 Ves. 509.

(r) Bradshaw v. Outram, 13 Ves.

234.
(s) 2 Eq. Abr. 77. Clarkson v. Bowyer, 2 Ves. 60.

(t) 2 Fresc. 52.

(u) Lewis v. Nangle, 2 Ves. 431.

A second mortgagee who brings a bill to redeem a prior mortgage, must make the heir of the mortgagor a party; and that, though the second mortgage is only of part of the estate comprised in the first, and under a different title; (v) but it is not necessary to make his personal representative a party. (w)

On a bill for foreclosure, brought against the heir of the mortgagor, it is not necessary to make the executor a party. (x) The usual practice is, to make all encumbrancers, *previous* to the filing of the bill, (y) a party. In one case, a bill of foreclosure was ordered to stand over, to make a judgment creditor (who was the *only* encumbrancer not before the court) a party; but the court would not, from a feeling of the inconvenience that might ensue, lay down, generally, that *all* encumbrancers must be parties. (z) Encumbrancers *subsequent* to the filing of a bill for a foreclosure are not necessary parties; for, according to **the doctrine of lis pendens*, an alienation, pending a suit, is **151* void. (a)

Where a mortgagee, who has a plain redeemable interest, makes several conveyances upon trust, in order to entangle the affair, and render it difficult for a mortgagor or his representative to redeem, it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties. But where the redemption depends upon equitable circumstances, and the plaintiff is not in the common case of redemptions, and where the mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete, without bringing, at least, the first tenant in tail before the court. (b)

If the mortgagees had acquired their title during an abatement of the suit, there would be great difficulty; though, in such

(v) *Palk v. Lord Clinton*, 12 Ves. 48.
Fell v. Browne, 2 Bro. C. C. 276.
Woodcock v. May, Lord Nottingham, MS, noticed, 12 Ves. 59.

(w) *Fell* against *Browne*, 2 Bro. C. C. 279.

(x) *Duncombe* against *Hansley*, mentioned in notes A. to 3 P. Wms. 333.

(y) *Bishop of Winchester v. Payne*, 11 Ves. 196.

(z) *Vid. Bishop of Winchester v. Bearor*, 3 Ves. 314. See *Palk v. Clinton*, 12 Ves. 58.

(a) *Walker v. Smallwood*, Ambli. 676. *Gaskill v. Dunning*, 1 Ball and Beatty, 167. *Moore v. Macnamara*, 4th 187, 8.

(b) *Yates v. Hambly*, 3 Atk. 237, 238.

case, Lord Nottingham seems to have thought the decree would be binding. (b)

If there have been several mesne assignments of a mortgage, all those assignees are not necessary parties, (unless the mortgagor was a party to them, or declared what was due,) but only the last assignee. (c) An under mortgagee, bringing a 'bill' to foreclose, must make the original mortgagee a party. (d)

*152 By the 39 and 40 Geo. III. c. 36., courts of *equity were authorized to order the bank, the *East-India*, or *South Sea* companies to transfer stock, or pay dividends to parties in a suit, and may issue an injunction to prevent such transfer or payment without the bank, &c. being made a party; but this salutary act, it has been held, does not preclude the plaintiff from making these companies parties, if advisable. (e)

On a bill against an executor for an account, it is not necessary to make the *attorney general* a party, in respect of a legacy given to a charity. (f)

Where some of the undertakers under the stat. 4 Anne, c. 14., in regard to briefs, are dead; in a bill for an account, their representatives need not be brought before the court, for they are each answerable, the one for the other. (g)

In a bill by creditors or legatees, it is not necessary to make *residuary legatees* parties. (h)

Creditors of a testator, or intestate, need not, or, rather, cannot, (i) make any body but the personal representative a party. But in a case of insolvency, (k) or where there are any persons who have possessed the estate, or any debtors of the deceased, who deny they have any such assets, or apply them improperly

*153 ly; (l) or where there is any *collusion between them and the re-

(b) Bishop of Winchester v. Payne, 11 Vek. 200.

(c) See Chambers v. Goldwin, 9 Ves. 268. Hill v. Adams, 2 Atk. 39.

(d) Hobart v. Abbot, 2 P. Wms. 642.

(e) Temple v. Bank of England, 6 Ves. 770.

(f) Chitty v. Parker, 4 Bro. C. C. 36.

(g) Ex parte Angel, 2 Atk. 162. S. C. Barn. 423.

(h) Anon. 1 Vern. 261. Lawson against Barker, 1 Bro. C. C. 303.

(i) Vid. Alsager v. Rowley, 6 Ves. 748.

(k) Ib.; and see Utterson v. Mair, 2 Ves. Jun. 95. and S. C. 4 Bro. C. C. 270.

(l) Simpson v. Vaughan, 2 Atk. 33.

representative, they may in equity, though not at law, follow the assets, make them parties, and demand an account.(m)

If a bill be filed by a *specialty creditor* against the heir, the executor must be a party.(n)

If a bill be filed by a creditor by bond, against a devisee of the creditor's real estate,(o) or against an assignee of the devisee, the devisor's heir must be made a party.(p)

If a bill be filed by the assignee of a bond, the representative of the original obligee must be a party.(q)

It is said to be a rule in equity, that where two or more are liable to a demand, one alone cannot be proceeded against, but all the persons liable must be brought before the court.(r) On this subject, Lord *Hardwicke* says,(s) "the general rule of the court, to be sure, is, where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are entitled to the assistance of each other in taking the account: another reason is, that the debtors are entitled to a contribution, where one pays more than his share of the debt: A further reason is, *if there are different funds, as where the *154 debt is, by specialty, and he might at law sue either the heir or executor for satisfaction, he must make both parties, as he may come in the last place upon the real assets.(t) But there are exceptions to this; and the exception out of the first rule is, that if some of the obligors are only sureties, there is no pretence for the *principal* in the bond to say, that the creditor ought to bring the surety before the court, unless he had paid the debt. The exception out of the second rule is, that if there are no personal assets at all, and this fact appear plainly in the cause, there is no occasion to bring the representative of that co-obligor before the court."(u)

(m) *Newland v. Champion*, 1 Ves. 105.; and see *Doran v. Simpson*, 4 Ves. 665.

(n) *Knight against Knight*, 3 P. Wms. 331. *Madox v. Jackson*, 3 Atk. 408.

(o) *Gawler v. Wade*, 1 P. Wms. 99.

(p) *Warren v. Stawell*, 2 Atk. 125.

(q) *Ray v. Fenwick*, 3 Bro. 25.; and see *Cathcart v. Lewis*, 1 Ves. Jun. 484.

(r) *Jackson v. Rawlins*, 2 Vern. 95.

(s) *Madox v. Jackson*, 3 Atk. 406.; and see *Anon.* 2 Freem. 127.

(t) See also as to this, *Galston v. Hancock*, 2 Atk. 436.

(u) In *Collins v. Griffith*, 2 P. Wms. 313. it was held, that if two obligors in a bond be bound jointly and severally, and one dies, the executors of the deceased obligor may be sued in equity for the debt, without making the surviving obligor a party. Sed qu.

In a case, however, before Lord *Thurlow*, where a bill was filed by a bond creditor for an account of the assets of the testator, and to be paid his bond, in which one *Cobb* was surety with the testator, he held it to be necessary that *Cobb* should be made a party,^(v) in opposition to what is said by Lord *Hardwicke* as to sureties; and observed, "that if you sue on a joint and several bond, I have always understood it was necessary to bring all before the court to prevent circuitry; but if the bill *155 states, and the defendant *admits the co-obligor to be insolvent, the objection seems to me to be removed."^(w)

Lord *King* appears to have agreed with Lord *Hardwicke*, and expressly held,^(x) that in the case of a joint and separate bond, the obligee might proceed in equity for an account against any one of the obligors named in the bond, and seemed to have thought, that it was one of the greatest advantages of a bond of that description.

On a bill for an account of fees, to establish a right, all persons must be before the court, who have any pretence to a right; for they will be bound by a decree; it is otherwise as to a judgment at law, which will not bind the right of a third person.

Though the person is come of age, during whose infancy the will appointed an executor, *durante minore etate*, yet such executor, if he has not collected in the whole estate, must be brought before the court.^(y)

One joint tenant cannot be made a defendant without the other.^(z)

Upon a bill for a specific performance of a covenant by *A.* for the benefit of *B. A.* must be a party to the suit.^(a)

Those only are to be considered as parties against whom process is prayed.^(b)

*156 *A decree always guards against the rights of persons not parties to the suit, for it gives relief on the terms, that such persons be not prejudiced.^(c)

(v) *Angustain v. Clark*, 2 Dick. 728.

(w) *Ib.*; and see *Cockburne v. Thompson*, 16 Ves. 236.

(x) *Collins v. Griffith*, 2 P. Wms. p. 313.

(y) *Glass v. Oxenham*, 2 Atk. 121.

(z) *Flach*, 32.

(a) *Cooke v. Cooke*, 2 Vern. 36.

(b) *Windsor v. Windsor*, 2 Dick. 707.

(c) *Shine v. Gough*, 1 Ball and Beatty, 447.

LETTER MISSIVE AND SUBPŒNA.

When a bill is filed, the next process is a *subpœna*, unless the defendant is a peer, or peeress, or bishop; who are entitled to a letter missive.

The right of peers to a *letter missive* is very ancient. (a) They have a right also to a copy of the bill, though this is often voluntarily waived. It is a privilege of *peerage*, not of parliament, and extends equally to *English* and *Scotch* peers; (b) and, since the union, *Irish* peers (with the exception of those who are members of the house of commons) are entitled to the *letter missive*. (c) An injunction or other process, not so accompanied, will be ineffectual. (d)

The *letter missive* is obtained by a petition to the chancellor after the bill is filed, and it is served on the defendant, with an office copy of the bill, signed by the six clerk; and if he refuses, upon such service, to appear to the bill, he is then served with a *subpœna*. (e)

It is not the practice now, as formerly, to take out a *subpœna* before the bill is filed. (f)

*By the 4 and 5 Anne, c. 16. it is provided, that no *subpœna* *157 or other process for appearance shall issue till after the bill is filed, and a certificate thereof brought to the *subpœna* office; except in cases of bills for an injunction to stay waste, or to stay suits at law commenced. And if, in these excepted cases, the bill is not filed by the return of the *subpœna*, the defendant need not appear, or may appear, and obtain his costs. (g)

By an order of Lord Clarendon, all bills are to be dated the same day they are brought into the six clerk's office. (h) As many *subpœnas* may be obtained as may be necessary; but only three defendants can be inserted in one *subpœna*: a man and his wife are considered only as one defendant.

Where there is only one defendant, the body of the *subpœna* is left with him; (i) but where there are several, the labels are

(a) Lord Milington v. Earl of Portm., 1 Ves. and Bea. 421.

(b) *Ib.*

(c) Robinson v. Lord Rokeby, 3 Ves. 691. 1 Ves. and Bea. 419.

(d) 1 Ves. and Bea. 419.

(e) See Newland's Harrison's Pract. 181.

(f) Leman v. Newnham, 1 Ves. 64.

(g) Tunn. and Ven. Ch. Prac. 66.

(h) Ord. Chan. 23.

(i) Anon. 3 Ark. 587. De. Talbot v. Sidney, 1 Anstr. 79.

left with the first defendants served; showing them the body only, and with the last defendant, the body itself is left. *(k)*

If the defendant appears, it cures irregularities in the service of the subpoena; unless it be just before the long vacation, and the defendant chose rather to appear than be liable to an attachment, in which case he is still at liberty to insist upon not being served at all, or irregularly served. *(l)*

- *158 Service at any period of the return-day of *the subpoena, before twelve o'clock at night, is deemed good service. *(m)*

The service of a *subpoena* upon the mother or father-in-law of an infant has, on a motion for that purpose, been allowed; *(n)* as where the mother secreted infants, parties to the suit. *(o)*

It has been holden, that leaving a *subpoena* to appear and answer at the lodgings of a defendant, who had left them twelve months previous, is not good service, though an order be obtained for that purpose. *(p)*

Where defendants are beyond the jurisdiction of the court, service of the subpoena on their clerk in court will not be allowed to be deemed good service, though they have by that clerk in court filed a bill relative to the same subject. *(q)*

Service of a subpoena upon a defendant, *while abroad*, *(r)* or in *Scotland*, *(s)* is good service.

Though a defendant residing out of the jurisdiction has given a power of attorney to *A.* to act for him in the management of his affairs, the court refused to allow substitution of the subpoena to appear and answer on *A.* *(t)*

- *159 *In several cases the court has, upon an affidavit of the merits of the suit, substituted service, where the party goes out of the way, and there is a person whom he has named in court as his agent, and whom the court can look on as such; as in the case

(k) Anon. 3 Atk. 567.

(l) *Ib.*

(m) Turs. and Ven. Pract. 68.

(n) Thomson v. Jones, 8 Ves. 141.

Baker v. Holmes, 1 Dick. 18. 77.

(o) Smith v. Marshall, 2 Atk. 70.

(p) Parker v. Blackburn, 2 Vern. 309.

(q) Bond against Duke of Newcastle, 3 Bro. C. C. 388.

(r) Scott against Hough, 4 Bro. C. C. 213.

(s) Bourke v. Lord Macdonald, 2 Dick. 587.

(t) Smith v. Hibernian Mine Company, 1 Sch. and Lefr. 238. overruling Carter and De Brune, 1 Dick. 39. Hales v. Sutton, 1 Dick. 28.

of an injunction bill, the attorney at law is an agent, constituted by the person making the demand, for the purpose of prosecuting that demand at law, and the suit in equity is a defence to that demand; therefore, service upon him has been held good service;(u) but the court will not order such attorney to put in an answer without oath.(v)

A subpoena sent under cover, to the person to whom the defendant had directed his letters to be sent, has been held good service.(w)

If, the defendant be a close prisoner, service of the body of the writ on the turnkey seems sufficient; but if the prisoner be within the rules of the prison, an order for such service seems necessary; but, in both cases, personal service, if feasible, is to be preferred; but no process can be served upon a prisoner committed at the suit of the crown, without leave.(x)

If a defendant, against whom an *amended bill* is filed, but upon whom no subpoena has been served, has appeared upon two motions, and lives *abroad, out of the jurisdiction, and refuses to answer, the court will order, that service of the subpoena to answer the amended bill upon the clerk in court or the solicitor, be deemed good service.(y) *160

If, on the service of the subpoena, contemptuous words are spoken of it, the offender, upon motion, supported by the affidavit of two persons, will be committed without further examination; and a single affidavit is sufficient to grant an attachment, upon which he may be examined. If, on such examination, the misdemeanor is confessed, he will be committed; but if denied, he will be discharged, but without costs, in respect of the oath made against him.(z)

If the person serving the subpoena is beaten or abused, the offender will, on affidavit of the fact, by more than one witness, be committed. But though contemptuous words are spoken of a subpoena, and the person serving it severely beaten, yet, if the

(u) 1 Sch. and Lafrey, 239. Delaney against Wallis, 3 Bro. C. C. 12. Anderson v. Lewis, 3 Bro. C. C. 429. Stephens v. Cini, 4 Ves. 359. overruling Burke v. Vicars, 3 Bro. 24. French v. Roe, 13 Ves. 593.

(v) Anon. 1 P. Wms. 523.

(w) 5 Ves. 157.

(x) Tuss. and Ven. Prac. 70. Prac. Reg. 403.

(y) Gildenichi v. Charnock, 6 Ves. 170.

(z) Newl. Harr. 107.

facts are proved by the oath of a single person only, the court will not, in the first instance, order the offender to stand committed, but make an order upon him to show cause why he should not stand committed.(a)

Whenever a person is called upon to answer for a contempt, the court exercises its *sound discretion* on the subject,(b) and considers, whether the party acted under a *mistake*, or *contumaciously* towards the court.(c)

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**Appearance.*

When the bill is filed, and process served, the defendant must appear.

A party may, without having a subpoena served upon him, appear *voluntarily* to a bill,(d) and refer it for impertinence,(e) or plead and answer; and does not lose his costs by such voluntary appearance.(f)

If the defendant lives within twenty miles of London, the suit is termed a *town cause*, and he has four days to appear in, after the return of the subpoena, unless it was served at least a day before the return, and then he must appear at the return-day, or the day after; but if the defendant lives beyond twenty miles, it is termed a *country cause*, and he has eight days after the return to appear, unless he is served with the subpoena at least eight days before the return, in which case he has only till one day after the return to appear.(g)

The appearance is entered by the clerk in court, employed by the defendant's solicitor.

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Where a bill is brought against an infant, he *must*, if in town, appear in court, and have a guardian assigned him; if he resides in the country, he must sue out a commission to assign a guardian.(h)

If there be a general letter of attorney, to one, to appear to

(a) Anon. 3 Atk. 219.

(b) Ball v. Coutts, 1 Ves. and Beames, p. 297.

(c) Page, ex parte, 17 Ves 61.

(d) Travers v. Buckley, 1 Ves. 386.

S. P. Anon. MS.

(e) Fell against Master of Christ's College, 2 Bro. C. C. 279.

(f) Bowhee v. Grills, 1 Dick. 68.

(g) See Newland's Harrison, 108. In

Turner and Ven. 1 vol. p. 72. it is said, in a town cause, that if the service be on the return-day, or a day or two before, he has four days after the service to appear in; and that, in a country cause, if served four or five days before the return, he has only four or five days after the return to appear.

(h) Newl. Har. p. 112.

and defend suits, the court would order such attorney to appear for the principal, and that service on him should be deemed good service.(i)

If the defendant neglects to appear, it is considered as a contempt of the court, and an attachment will be issued, upon an affidavit(k) of service of the subpoena; and if *non est inventus* is returned by the sheriff, an attachment with proclamations may be issued; and if this is also returned *non inventus*, a commission of rebellion for the defendant's apprehension may be obtained; and if, upon this commission, he is returned *non inventus*, a *serjeant at arms* may be moved for; and if he certifies that the defendant cannot be taken, a motion may be made on his certificate, for an order for a *sequestration*, directed to certain commissioners, to sequester the defendant's personal estate, and the rents and profits of his real estate, until answer and further order.(l)

No process in respect of a contempt can be obtained by a plaintiff, suing *in forma pauperis*, until it is signed by the *six clerk*, who acts for *the pauper*, and who is himself answerable, *163 if any needless or vexatious use is made of the process.(n)

An attachment for nonappearance cannot, it seems, be taken out before the bill is entered in the bill book, though filed in the *six clerk's* office.(n)

The writ of attachment must be made returnable in term, and there must be *fifteen* days between the teste and return of the different writs anterior to a sequestration, or to taking a bill *pro confesso*, unless the defendant lives within ten miles of London, in which case an order may be obtained, on motion or petition, to make the several processes of contempt returnable immediately.(o)

When a *cepi corpus* is once returned, there is an end of all manner of process; (for no proclamation or commission of rebellion goes after that;) and, in such case, the plaintiff should move, that the defendant may enter his appearance, and be examined within four days, or stand committed.(p)

(i) Anon. 1 P. Wms. 523. *Salvadore and Thornton*, 24 Geo. II. 1747. MS.

(k) See *Bromhead v. Smith*, 8 Ves. 357. Ord. Ch. 85.

(l) Newl. Har. 115.

(m) Ord. Chan. 125.

(n) *Leman v. Newsham*, 1 Ves. 53.

(o) Newl. Harr. 117.

(p) See note of reporter, in *Frederick v. David*, 1 Vern. 344.

Sequestrations are now a common process, and have been said to be first introduced in Lord Bacon's time; (g) but it rather seems, they were first *adopted in the time of his predecessor, Lord Coventry. North, in his entertaining life of his relation, the Lord Keeper Guildford, says, that "*sequestrations* were not heard of till the Lord Coventry's time, when Sir John *Rodney* lay in the *fleet* (with 10,000*l.* in an iron cash chest in his chamber) for disobedience of a decree, and would not submit and pay the duty." This being represented to the lord keeper, as a great contempt and affront upon the court, he authorized men to go and break up his iron chest, and pay the duty and costs, and leave the rest to him, and discharge his commitment. From thence," says North, "came *sequestrations*, which now are so established as to run of course, after all other process fails, and is but in nature of a grand distress, the best process at a common law, after a summons such as a *subpoena* is. What need," continues he, "all that grievance and delay of the intervening process?" (r)

Sequestrations are; either upon *mesne* process, or after a decree. We shall only consider here, *sequestrations* upon *mesne* process.

Sequestrators on *mesne* process are accountable for the profits, and can retain only so far as to satisfy for the contempt. (s)

A *sequestration* affects the personal estate, and the rents and profits of the real estate, but not the land, (t) and it binds from the time of *awarding the commission, and not merely from the execution of it. (u)

Under a *sequestration* in respect of a contempt for want of appearance, the *sequestrators* may take possession of the party's personal property, and keep him out of possession, but no sale can take place, (v) unless perhaps to pay the expenses; (w) for this process is only to form the foundation of taking the bill *pro confesso*. After a decree, it may be sold. (x)

(g) Sic Arg. *Earl of Kildare v. Sir M. Eustace*, 1 Vern. 421. As to the origin of *sequestration*, see *Hyde v. Pettit*, 1 Ch. Ca. 91.

(r) North's Life of Lord Keeper Guildford, p. 73.

(s) *Gibson v. Seervington*, 1 Vern. 247.

(t) *Hyde v. Greenhill*, 1 Dick. 107.

(u) *Burdett v. Rockley*, 1 Vern. 158.

(v) *Hales against Shafto*, 3 Bro. C. C. 72.

(w) *Haley against Shaftoe*, 1 Ves. jun. 88. S. C. 2 Dick. 711.

(x) *Crawley against Clarke*, 3 Bro. C. C. 372.

Perishable commodities, however, or rents paid in kind, the natural produce of a farm, taken under a sequestration, will, on motion, be ordered to be sold; but there should be notice of the motion.(y)

There is no instance of an order to sell, under a sequestration, a subject which passes by *title*, and not by *delivery*, for, in such case, no title can be made.(z) Though estates cannot, for this reason, be sold, yet the court will direct the application of the *rents and profits*,(a) and the arrears thereof, and the dividends of money in the bank.(b)

Where, after a sequestration on mesne process, and notice of the same to the party's banker, the *moneys in such banker's hands were paid to the party, it has been questioned, whether by such payment they render themselves liable for the amount.(c) *166

If doors are locked, and admittance refused to sequestrators, the court will order a writ of assistance, to put the sequestrators in possession.(d)

If a defendant having *privilege of parliament*, neglects to put in an appearance, the court, on a return of process of sequestration, may appoint a clerk in court to enter an appearance for him.(e)

On a bill against the marquis of *Donegall*, and others, the marquis did not appear, and process of sequestration was issued; and it was held that the plaintiffs, having used all means to bring all parties before the court, were entitled to set down the cause, for the purpose of having a decree against the codefendants.(f)

When a party is taken upon any of these processes, he must pay the costs, and either give his bond with sureties for his appearance, or enter his appearance with the register, and after an attachment with proclamations returned, no commission to an-

(y) *Mitchel v. Draper*, 9 Ves. 208. See contra, *Wilcocks v. Wilcocks*, Amb. 421.

(z) *Shaw v. Wright*, 3 Ves. 22. *Seton v. Stone*, 1 Dick. 107.

(a) *Ib.*

(b) *Hamlin v. Lee*, and *Fawcett v. Fothergill*, cit. 4 Ves. 747. Arg.

(c) *Simmonds v. Lord Kinneird*, 4 Ves. 747.

(d) See Register's Statement of the Practice, 2 Dick. 695. and the cases there cited.

(e) See 45 Geo. III, c. 124. *Read v. Philips*, 16 Ves. 436.

(f) *Downes v. Thomas*, 7 Ves. 206.; and see *Phillips v. Duke of Buckingham*, 1 Vern. 227.

answer can be returned, nor any plea or demurrer admitted but upon a special order for that purpose. (g)

- *167 When the defendant is taken upon an attachment, *or the succeeding process, and continues to refuse to enter his appearance; a writ of *habeas corpus* may, on motion, or a petition, be obtained, directed to the person in whose custody he is, to bring the prisoner before the chancellor, to show cause why he refuses; if no return is made to the first writ, an *alias*, and afterwards a *pluries* may be obtained. (h)

If a defendant is taken upon an attachment, for want of an appearance, and the sheriff returns *cepi corpus*, but, by reason of the defendant's weak state of health, extreme infirmity, and the peril of her life, he did not remove her, a messenger will be ordered. (i)

An infant plaintiff, a ward of the court, having married, proceedings were staid till the husband had appeared to a bill of revivor. (k)

If there be two defendants, and one of them does not appear, and the whole line of process runs against him, it is equal to the proceeding to outlawry at common law; and proceedings may be had against the other defendant. (l)

If the attorney general does not appear to a bill, an application cannot be made for an order to direct him to appear. If he will not appear, it must be considered as *nil dicit*. (m)

- *168 Formerly, by the king's demise, all process of contempt not executed, was determined, so that the party was obliged to begin again at an attachment; but where any process was executed, and a *cepi corpus* returned, the process stood good; (n) and now, by the statute, all process remains unaffected.

The defendant being a prisoner in York gaol, and the demand so trifling, it would not bear the expense of removing him by *habeas corpus* to the fleet, it was moved, to save the expense, that, for want of appearance, the bill might be taken *pro confesso*; but the court refused to do it in that summary way. (o)

Where a corporation are defendants, and they refuse to appear,

(g) Newl. Har. 180.

(h) Newl. Har. 124.

(i) Miles v. Lingham, 7 Ves. 230.

(k) Brummell v. M'Pherson, 7 Ves.

237.

(l) Vanison v. South Sea Company, 1 Ves. 306.

(m) Barclay v. Russell, 2 Ves. 729.

(n) Anon. 1 Vern. 300.

(o) Anon. 3 Atk. 690.

no attachment is issued, but a *distringas*, and, if necessary, an *alias* or *pluries distringas*, and, afterwards, a sequestration. (p)

By the 5 Geo. II. c. 25. where persons do not enter an appearance within the usual time *after a subpoena issues*, and is justly suspected to abscond, to avoid the process, the court, out of which such process issues, is authorized to fix a day for his appearance to be inserted in the *London Gazette*, and published on the Lord's day in the parish church of the defendant; and a copy of the order of the court is to be posted up at some public place, at the Royal Exchange, in London; and on the defendant's not appearing in the time limited by the court, the court may order the plaintiff's bill to be taken *pro confesso*, his effects or estates to be sequestered, and the plaintiff's demand to be satisfied out of the estate or effects so sequestered. There was a doubt whether this act extended to bills of review, but it is settled that it does. (q) *169

If the minister of the parish prevents an order for the defendant's appearance being published pursuant to this act, he is indictable for a contempt. (r)

The eighth section of the act requires an affidavit that the defendant had been in the kingdom within two years before the subpoena issued; but where a person had been abroad upwards of two years, and had been outlawed, a motion was allowed, upon the equity of the statute, that the defendant should appear to the subpoena within a limited time, upon an affidavit that the defendant continued abroad to avoid process. (s)

An order has been made under this act for the defendant to appear, notwithstanding a subpoena had been served, (t) and an attachment issued; the party absconding to avoid the attachment. (u)

In a case where an order had been obtained pursuant to the act, but the parish church being under repair, it could not be published in the church as directed by the act, another motion

(p) Newl. Harr. 149, 150.

(q) Anon. 3 Atk. 690.

(r) Barton v. Matton, 2 Atk. 114.

(s) Anon. 2 Ves. jun. 189.

(t) Mawer v. Mawer, 1 Bro. C. C.

388, 9.

(u) Goddard v. Pritchard, 2 Dick.

692.

*was made and allowed, to fix another day for the appearance of the defendant.(v)

The service of an order of *sequestration nisi* upon the clerk in court, is good, (w) if the plaintiff has tried in vain to serve it personally; (x) but the absolute order requires personal service. (y)

Sequestration only goes where a party is in the custody of the warden of the *fleet*: being in the *king's bench*, or the custody of the sheriff, (z) will not do; but the party must first, by *habeas corpus*, be committed to the *fleet*.

If a defendant is a prisoner in the *king's bench* prison, under a criminal prosecution, he may be brought up by *habeas corpus*, and turned over to the prison of the *fleet*, *pro forma*, (to ground an order for sequestration,) and from thence carried back to the *king's bench*, with his cause, and immediately a sequestration moved for and obtained. (a)

Motions after Bills filed and before Answer.

Before we proceed to the consideration of particular motions, it may be proper to make some observations on motions in general.

Motions are made in all stages of a suit, and are either *special*, or, of course. A special motion is made in court, *ore tenus*, *171 after two days' *previous notice in writing, to the opposite party, or his clerk in court, of the motion, and may be opposed, if there be a sufficient ground of opposition. A motion of course, is made in court, but without any previous notice, and cannot be opposed.

The objects of motions of course may in general be obtained upon a petition.

If a special motion is intended to be made on a *Thursday*, a notice must be given on the preceding *Tuesday*. One clear day must intervene between the day on which the notice is given and the motion is made. *Sunday* is not, for this purpose,

(v) Knowles v. Broom, 1 Ves. and Beames, 305. Wilkinson and Cober, 1 Dick., 74.

(w) 3 Anstr. 647.

(x) Marquis of Lothian v. Garforth, 5 Ves. 113.

(y) 3 Anstr. 647.

(z) Markham v. Wilkinson, 2 Anstr. 579. Kinsey v. Yardley, 1 Dick. 265.

(a) Bowes v. Strathmore, 2 Dick.

accounted as a day. A notice, therefore, of a motion given on *Saturday*, is not a sufficient notice for a motion on *Monday*, but would be good for *Tuesday*.(a)

Notices of motions, on behalf of a party suing in *forma pauperis*, must be signed by the clerk in court.(b)

Motions may be classed under three heads. 1. Those made upon the filing of a bill, and before an answer. 2. Those made after an answer, and before a decree. 3. Those made subsequent to a decree. We shall here treat of motions made after bill filed, and before answer.

A special motion may, after a bill filed, be made by the plaintiff for various purposes. Those the most frequently made, are, 1. For an injunction. 2. A writ of *ne exeat regno*. 3. A guardian. *4. A receiver. 5. Amendment of the bill. 6. That *172 the bill may be taken pro confesso. 7. That witnesses may be examined de bene esse. 8. For payment of money into court. 9. For leave to prosecute as a pauper. On the part of a defendant, a motion of course may be made, 1. For time to answer. 2. For a commission to take an answer. 3. To refer the bill for scandal or impertinence. 4. That defendant, a married woman, may defend a suit separately. A defendant may also make a special motion. 5. For a reference to the master on bills of foreclosure, specific performance, &c. 6. For a reference to inquire whether two suits are for the same matter. 7. That defendant may have a month's time to answer after payment of the costs by the plaintiff of a previous suit. 8. For an order to defend in *forma pauperis*. 9. That plaintiff may give security for costs. 10. For leave to amend a plea. 11. To stay proceedings on original bill, till cross bill answered. 12. For a reference to the master, to see if a bill filed on behalf of an infant is for his benefit. 13. For a guardian to put in answer.

1. Motion for an Injunction.

The principles of the court, as to injunctions, have been fully considered in the preceding volume.(c)

In general, if the bill does not pray an injunction, the plaintiff cannot move for the same *under the prayer for general re. *173

(a) *Maxwell v. Phillips*, 6 Ves. 146. (c) 1 vol. p. 103. etc.

(b) *Gardiner v. —* 17 Ves. 387.

lief;(d) but if after a decree for an account, under a bill for foreclosure, the mortgagor attempts to cut timber, the court will enjoin him, though there is no prayer for that purpose; and where, upon the contested construction of a will, a party was declared to be tenant for life, he was, on motion, restrained by injunction from cutting timber.(e)

The first and last days of term, and every Thursday in term, are days set apart for the hearing of motions; but motions of course, or such as will not take any great length of time in the argument, are permitted to be made every day in term, at the rising of the court. The seal days, appointed before and after every term, are likewise days set apart for motions; but on cause or petition days, or other days after term, motions are not permitted to be made at the rising of the court, as on days for causes in term; but the court will, sometimes, in pressing cases, give leave to move, and appoint a day.(f)

Though the next day after the last day of the term be not, in strictness, part of the term, and therefore no motion can then be made on the *petty bag* side; yet as to other purposes it is part of the term, and notices given of motions the last day of the term, may be moved at the rolls the day after.(g)

*174 A motion, the day after the term, to dismiss a *bill for want of prosecution, on a certificate that there had been no prosecution within three terms, of which the last term was one, was denied.(h)

Though the seal last three days it is considered as a continuance of the first day.(i)

An injunction, as before observed, will, in pressing cases, be granted upon *petition and affidavit* before the bill filed. It is often done in vacation: but on such petition an injunction only can be ordered, for the chancellor cannot order any thing to be done by the defendant upon the petition.(k)

(d) See Savory against Dyer, Ambli,

70.

(e) Wright v. Atkins, 1 Ves. and Beames, p. 314.

(f) Turn, and Ven. Prac. 2 vol. 683.

(g) Anon. 1 P. Wms. 522.

(h) Anon. 1 P. Wms. 522.

(i) Ib.

(k) Mayor of London v. Bolt, 5 Ves. 130.; and see Nichols and Kearsley, 2 Dick. 645. Chamberlain and Dummer, 2 Dick. 645. and Temple v. Bank of England, 6 Ves. 771.

It seems questionable, whether an injunction can be obtained upon petition at the rolls. *(l)*

In cases where irreparable mischief may be done in cases of waste, *(m)* or in a plain case of nuisance, *(n)* an injunction will immediately be granted.

The court will not, upon motion, make an order which will decide the merits of the cause, *(o)* not even by consent. *(p)*

If a motion be made and granted on a false suggestion, it will, on application, be discharged for irregularity, with forty shillings costs. *(q)*

Where notice of a motion is necessary, every thing the party moves for should be expressed, for the court will not, in general, extend the order beyond what is comprehended in the notice. *(r)* *175

If a notice of motion be three times given, and not moved, the costs must be paid before the motion on a fourth notice can be made.

All affidavits upon which motions are founded, ought to be filed so long before the motion, as that the other party may have time to take a copy; *(s)* but it is no objection to a motion that the affidavit was only filed the day before, if it is an affidavit that cannot be answered; as, that the plaintiff cannot go to trial with safety till the answer comes in. *(t)*

Whoever produces an affidavit of a person, to contradict a former one made by such person, should produce him in court, a personal examination being required. *(u)*

Affidavits may be referred for impertinence. *(v)*

Affidavits in a cause, or in bankruptcy, will be ordered to be taken off the file if irrelevant and scandalous; and costs will be given as between attorney and client. And this will be ordered, if necessary, by the court itself, without any special application for that purpose. *(w)*

(l) Garlick v. Pearson, 10 Ves. 432.

(m) 1 Ves. 476. 3 Bro. C. C. 378.

(n) Attorney General v. Doughty, 2 Ves. 453.

(o) 3 Bro. C. C. 366.

(p) Lisle v. Beresford, 2 Bro. 368.

(q) Harding v. Cox, 3 Atk. 523.

(r) 2 Turn. and Ven. 633. who cite Pract. Reg. 287.

(s) Newl. Harr. 400. Turn. and Ven. 2 vol. 546.

(t) Jones v. ———, 8 Ves. 46.

(u) Ex parte Lord, 2 Ves. 28.

(v) Phillips v. Phillips, 3 Atk. 391.

(w) Simpson ex parte, 15 Ves. 477.

Where there has been an infringement of *copy-right*, or where the proprietors of new inventions, under letters patent, file a bill for an injunction to stay other persons from doing any thing *176 of the same kind, the court will grant an injunction, *on the filing of the bill, and before the answer comes in, on affidavit and certificate.(a)

So, in cases of quieting possession, before the hearing, to a party, who has had the same three years; on a bill brought upon a forcible entry, an injunction, it seems, will be granted till answer, on a bill filed, and affidavits. Where an insolvent executor is getting in the assets before probate, the court will restrain, and direct the money to be paid into the bank, till answer and further order.(b)

So, if a *note* be obtained at play.(c) or be given for procuring a marriage, an order may be obtained on bill filed, and affidavit, to restrain the party from assigning or endorsing it over.(d) In other pressing cases, an injunction has, in like manner, been granted.(e)

To obtain an injunction in cases of *waste*, it must appear to be a case of *irreparable mischief* to a person who swears to his title. *Information and belief* as to title will not do:(f) there must be positive evidence of actual title.(g) It is not sufficient to swear you are *credibly informed* the defendant intends to commit waste, but it must be proved, either that he had laid *177 the axe to the root, *or some person must swear he threatened to do it.(h)

If an injunction bill be filed and full answers put in, the injunction will not be granted on an *amended* bill and affidavit, if no new fact which the plaintiff did not know when the original

(a) *Lowther v. Hamper*, 3 Atk. 496.
Patrick v. Harrison, 3 Bro. C. C. 376.

(b) See *Patrick v. Harrison*, 3 Bro. C. C. 376.; and see *Cutlett v. Smith*, mentioned in *Newl. Har.* 543.

(c) ——— *v. Blackwood*, 3 Anstr. 851.; and the cases there cited, 3 Bro. C. C. 376.

(d) *Smith v. Aykwell*, 3 Atk. 566.
Patrick v. Harrison, 3 Bro. C. C. 376.

(e) See 5 Ves. 129.

(f) *Davis v. Leq*, 6 Ves. 787. *Whitley v. Whitley*, 1 Bro. C. C. 67.

(g) *Ib.*

(h) *Hanay v. M'Entire*, 11 Ves. 55.; and see *Hanson v. Gardiner*, 7 Ves. 309.

bill was filed, is brought forward, particularly, where the defendant is abroad.(i)

An injunction is never granted on a bill and affidavit, to stay proceedings at law, nor till the defendant prays a *dedimus*, or is in contempt;(k) nor can an injunction to stay trial be had in the first instance. The common injunction is first obtained, and then a motion may be made to extend it, to stay trial.(l)

An injunction will not be extended to stay trial at law, for want of an answer, unless it is supported by an affidavit, in which the plaintiff states his belief that the answer will give a discovery, material to his defence at law;(m) but it is not necessary that the affidavit should be particular, as to the discovery expected.(n) Upon a proper affidavit, the trial will be staid till answer, though the defendant be resident in the *East-Indies*.(o)

In those cases where an injunction is obtained, *merely upon *178 an affidavit and certificate of the filing of the bill, without any *subpoena* served, the plaintiff is considered as having waived his right to an answer, and it is competent to the defendant to apply to the court to dissolve the injunction upon the merits disclosed by the affidavit.(p)

Injunctions, unless issued upon a *special application*, after a bill filed and affidavits, can only be obtained upon the defendant's answer, or upon an order for time to answer, or an attachment sealed, for want of an answer.(a)

But an injunction upon an *attachment* or a *dedimus*, or upon the defendant's *praying time*, though it stays proceedings at law, does not stay proceedings in the *spiritual court*: for that purpose, a *special motion* is necessary; and it has been doubted, whether the same rule does not hold with regard to proceedings in the court of *admiralty*.(b)

Where a *dedimus* is prayed, the plaintiff may move for the common injunction; and if the motion is made *before* a declara-

(i) *Norris v. Kennedy*, 11 Ves. 565.

(k) *Anon.* 2 Freem. 6.

(l) 3 Bro. C. C. 37. 10 Ves. 450.

(m) *Appleyard and Seton*, 16 Ves. 223. *Hartley v. Hobson*, 2 Dick. 728.

(n) *Farrar v. Lewis*, 2 Dick. 729.

(o) *Rivet v. Braham*, mentioned Newl. Har. 546.

(p) *Attorney General v. Nichol*, 16 Ves. 340.

(a) *Vid. Cousins v. Smith*, 13 Ves. 166, 7. 3 Atk. 496. 2 Ves. 121. 453. 3 Anstr. 645.

(b) *Anon.* 1 P. Wms. 301. S. P. 1 Dick. p. 223.

tion, the injunction stays every thing : if *after* a declaration, the injunction stays execution only, and not trial. When a motion is made to stay execution, the plaintiff cannot, at the same seal, move for a special injunction to stay trial.(c)

*179 . *In the court of *exchequer*, an injunction stays all further proceedings, whatever state the cause may be in.

The court will not, before answer, restrain proceedings on a judgment,(d) unless it be for want of an answer, in which case, if the defendant be abroad, the money will, on affidavit contradicting the allegations in the bill, be ordered to be paid into court, or the injunction to be dissolved.(e) Where an injunction is obtained against proceedings at law, till the coming in of the answer of one defendant, who resides abroad, the plaintiff is not compellable to bring the money into court, unless on special circumstances.(f)

If a plea,(g) or a demurrer, be put in, an injunction cannot be obtained till their validity is decided; and for this reason, applications are frequent to have a plea(h) or a demurrer argued out of its course, because it prevents an injunction.(i)

An injunction obtained *before the commencement* of an action, prevents the defendant bringing his action, and arresting the plaintiff; and, though, after an action commenced, the defendant to the injunction bill may call for a plea and proceed to judgment at law, yet if bail are excepted to before the injunction is served, and *after the injunction, the sheriff is ruled to bring in the body, this has been held to be a breach of the injunction.(k) Where bail is put in above, an injunction to stay proceedings against the principal, extends to proceedings against the bail.

(c) Garfick v. Pearson, 10 Ves. 450.
See also Wright v. Braine, 3 Bro. C. C. 37.

(d) Lane and Williams, 6 Ves. 798.

(e) Culley against Hickling, 2 Bro. C. C. 182. and the cases cited in the note; and see Acton against Market, 2 Bro. C. C. 14. and Sherwood against White, 1 Bro. C. C. 452.

(f) Sholbred v. Macmaster, 1 Astr. 366.

(g) Humphreys v. Humphreys, 3 Bl. Wms. 396.

(h) Anon. 2 Atk. 113.

(i) 2 P. Wms. 396.

(k) Bulley v. Ovey, 16 Ves. 141.; and see Leonard v. Attkewell, 17 Ves. 385. and Chaplin v. Cooper, 18 Ves. 19. It was said Arg^o. that an action is commenced by delivery of a declaration to a defendant, but that a declaration de bene esse is not the commencement of an action. Ib. p. 142. See Shidey v. Hetherington, 3 P. Wms. 148. in note.

Where bail is only put in below, such an injunction extends to proceedings on the bail bond.(l) Attaching and receiving money levied by the sheriff, though levied before the bill is filed, is a breach of the *injunction*: it would be otherwise if the sheriff had paid it *voluntarily*.(m)

Where an injunction had been obtained in a suit by an obligor, in a joint and several bond, to which 'suit' the co-obligor was not a party, and afterwards an execution was issued upon a joint judgment, with notice to the sheriff of the injunction, and directions not to take the plaintiff in equity, it was held not to be a breach of the injunction.(n)

If an injunction is obtained after an interlocutory judgment, (as by default, or on demurrer,) the plaintiff may go on to ascertain his damages, all the court intending to stop being the execution. The plaintiff at law is allowed to proceed so far, as that he may be at liberty, *eo instanti* that the judgment shall be dissolved, to take out execution; nor is it a breach of an injunction to sue out, where necessary, a *scieri facias*.(o) *181

If an injunction has been improperly granted, the defendant ought to apply to the court to alter the terms of the injunction, but he is not justified in disobeying the injunction, and then shelter himself by saying, that the court was wrong in granting it;(p) and such was the doctrine in the time of Lord *Nottingham*.(q)

Service of a copy of the injunction on the defendant, or on his attorney or solicitor, or their clerk, is good service.(r)

If the injunction be to *restrain an act*, and there is a breach of the injunction, a motion may be made, that the defendant shall stand committed. The defendant must be personally served with notice of the motion.(s) If the man be present in court when the order is pronounced, he is instantly a prisoner, and the warden may take him away to gaol directly. A party

(l) *Stone against Tiffin*, Attbl. 32.

(m) *Asse v. Clarke*, 2 Dick. 540.

(n) *Chaplin v. Cooper*, 18 Ves. 16.

(o) *Morrice v. Hankey*, 3 P. Wms. 147.

(p) *Marquis of Downshire v. Lady Sandys*, 6 Ves. 109, 110.; and see

statement of the register as to the practice, 2 Dick. 703.

(q) *Woodward v. King*, 2 Ch. Cas. 203. S. C. 2 Dick. 797.

(r) *Newl. Har.* 540.

(s) *Angerstein v. Hunt*, 6 Ves. 428.

may be arrested on a Sunday, on a warrant of commitment.(f) When the injunction is, *to do a thing*, an order must be obtained that he shall do it, by a particular day, or stand committed.(u)

- *182 If a defendant or his attorney were present *upon an order for an injunction to stay proceedings at law, and, notwithstanding, proceed at law, this is considered as a contempt, though the injunction was not sealed.(v)

2. Motion for a Writ of *Ne Exeat Regno*.

A writ of *ne exeat* issues with a view to obtain security for a demand from a person intending to leave the country, when the other party has not a legal remedy, and cannot hold him to bail.(a) The writ was originally confined to *state affairs*, and was not applicable in transactions between subject and subject;(b) and the intent was, to prevent any person from going beyond sea to transact any thing to the prejudice of the king or his government.(c) Now, however, it is applied at the discretion of the chancellor in *civil cases*;(d) but always with great consideration; particularly where foreigners are concerned;(e) for it is a severe process,(f) depriving the subject of his liberty. "I never apply it," says Lord Eldon, "without apprehension."(g)

- The Lord Keeper Wright seems to have thought the writ was a matter of right.(h) A *ne exeat* is obtainable on a bill filed, and a prayer for the writ; but if, after a bill filed, the plaintiff
*183 has *reason to think the defendant will go abroad, he may move to amend his bill, and pray a *ne exeat*; and notice of such motion is unnecessary.(i)

(f) *Ex parte Whitchurch*, 1 Atk. 55.
57.

(u) *Angerstein v. Hunt*, 6 Ves. 468.

(v) *Anon.* 3 Atk. 567.; and see *Skip v. Harwood*, *ib.* p. 566. *Osborne v. Tenant*, 14 Ves. 136.

(a) *Swift v. Swift*, 1 Ball and Beatty, 327.

(b) See *Bacon's Tracts*, 295. *De Carriere v. De Calonne*, 4 Ves. 590, 1. *Cock v. Ravis*, 6 Ves. 224. 3 P. Wms. 312. in note.

(c) *Anon.* 1 Atk. 531.

(d) 4 Ves. 590, 1.

(e) *De Carriere v. De Calonne*, 4 Ves. 577.

(f) 1 Ball and Beatty, 328.

(g) 1 Ves. and Bea. 373.

(h) *Wyatt's Pract. Reg.* 229.

(i) *Nisbett and Murray*, 30th April, 1795, mentioned in note 1. to 2 Vern. 435.

In general, the writ is obtained on the filing of the bill; but it is said to have been granted *before* a bill was filed. (k)

It is a rule that a writ of *ne exeat* is issued only upon a certain, (l) equitable, money (m) demand, at the instance of a plaintiff who shows a title to sue: (n) the only exception to the rule being, where there has been a decree in the ecclesiastical court for alimony and costs: (o) before such a decree the bill will not lie, (p) and the writ will be marked only for the arrears *actually due*. (q)

The writ is usually directed to the sheriff, to make the defendant find sufficient surety that he will not depart the realm without the order of the court, and, on his refusal to give such bail or surety, to the sheriff, to commit him to prison. (r)

In order to obtain the writ, application should be made as promptly as possible, and the plaintiff must swear *positively* that the defendant is going *abroad*, or to some declaration that he is. Nor is it sufficient to swear that another person said so. (s) *184

The affidavit must be as *positive* as to the *equitable debt*, as an affidavit of a legal debt must be, to hold to bail. Swearing to information and belief will not do, (t) except where it is matter of account, as in the case of partners and executors, (u) or in cases of *bankruptcy*, where the bankrupt swears positively, and the assignees as to belief. (v)

And where the balance of account is admitted, there, (the only exception to the general rule,) though bail may be had at

(k) *Roddam v. Hetherington*, 5 Ves. 92. *Lloyd v. Cardy*, Prec. Ch. 171.; but see *ex parte Brunker*, 3 P. Wms. 311.

(l) *Anon.* 1 Atk. 521.

(m) *Cock v. Raxie*, 6 Ves. 224.; and see *De Carriere v. De Calonne*, 4 Ves. 591.

(n) *Swift v. Swift*, 1 Ball and Bea. 326.

(o) *Read v. Read*, 1 Ch. Cas. 115. 2 Ch. Cas. 145. *Ex parte Whitmore*, 1 Dick. 143. *Anon.* 2 Atk. 210. *Pearne v. Lisle*, Amb. 76. *Shaftoe v. Shaftoe*, 7 Ves. 171. *Dawson v. Dawson*, ib. 173. *Oldham v. Oldham*, 8 Ves. 410.

(p) *Coglar v. Coglar*, 1 Ves. jun. 94. *Shaftoe v. Shaftoe*, 7 Ves. 172.

(q) *Haffey v. Haffey*, 14 Ves. 261.

(r) *Newl. Har.* 336.

(s) *Oldham v. Oldham*, 8 Ves. 410. *Etchae v. Lane*, 7 Ves. 417.; see also *Rico v. Gaultier*, 3 Atk. 501.

(t) *Hannay v. McEntire*, 11 Ves. 54. overruling *Russell v. Ashby*, 5 Ves. 29. See *Vid. Chapeaurouge v. Carteaux*, 8 Ves. 597. in note.

(u) *Jackson v. Petrie*, 10 Ves. 166. *Price v. Gaultier*, 3 Atk. 501.; but see as to *quasi account*, *Aminck v. Barclay*, 8 Ves. 597. and *Parker* against *Appleton*, 3 Bro. C. C. 427.

(v) 18 Ves. 133.

law, yet may a writ of *ne exeat* issue, marked for the amount of the admitted balance, (w) because, being matter of account, the court has jurisdiction. (x)

The affidavit must also state the facts on which the debt arises, and on which it is grounded, (y) and that the debt will be endangered by the party's going abroad; but it need not allege that the purpose of going abroad is to avoid the demand. (z) A denial by the defendant, on affidavit, that he is
 *185 *going abroad, will not hinder the effect of the writ. (a)

It has been said, that a *ne exeat* will not be granted where a person lives out of the kingdom, and the transaction was on the faith of having justice where he resided. (b)

Though some of the parties will not join in an action for a legal demand, yet a *ne exeat* cannot issue. (c)

A writ of *ne exeat* may issue to restrain a person going to Scotland; (d) though not, it seems, to restrain a person going to Ireland. (e)

Upon application for this writ, no subpoena is taken out, but, upon personal service of the writ, the defendant is bound to appear in court, and give security not to depart the kingdom. Having appeared, he must put in his answer, and may then apply to set aside the writ. (f)

The writ will be discharged if the party pays into court the sum for which the writ was marked, (g) or what, upon the answer, appears to be due, (h) or if he gives security to answer the decree. (i) The writ is, in all cases, marked for what is due. (k)

(w) Jones v. Sampson, 8 Ves. 593.

(x) See also Howden v. Rogers, 18 Ves. 133. Jones v. Alephsin, 16 Ves. 470. Hannay v. M^rEntire, 11 Ves. 64.

(y) Anon. 2 Ves. 489.

(z) Tomlinson v. Harrison, 8 Ves. 32.

(a) 8 Ves. 507.

(b) Robertson against Wilkie, Amb. 177.; and see 76. Sed Vid. S. C. 2 Dick. 786.

(c) Ex parte Duncombe, 2 Dick. 503.

(d) Donne's case, 1 P. Wms. 202.

Wilson v. Boswell, 2 Dick. 535. Hunter v. M^rCray, For. 196.

(e) Bernal v. The Marquis of Donnegal, 11 Ves. 47.; but see Howden v. Rogers, 18 Ves. 129.

(f) Russell v. Asby, 5 Ves. 99. See the remark on this case in Hannay v. M^rEntire, 11 Ves. 55.

(g) Evans v. Evans, 1 Ves. jun. 96.

(h) Dick v. Swinton, 1 Ves. and Bea. 373.

(i) Atkinson v. Leonard, 3 Bro. C. C. 218.

(k) Shaftoe v. Shaftoe, 7 Ves. 172. Dawson v. Dawson, 7 Ves. 174.

*It seems, that an application for a *ne exeat* may be founded on admissions in the defendant's answer; the admission answering the purpose of an affidavit.(l)

If a bill be dismissed with costs, and the plaintiff threatens to leave the kingdom, before the service of process to pay the costs can be made effectual, a writ of *ne exeat* may be obtained.(m)

The writ cannot be obtained on the affidavit of the wife of the party.(a) It appears, however, that, in one case, the Lord Keeper Puckering granted the writ upon such affidavit;(b) but the precedent was not followed by Lord Ellesmere.(c)

Where a wife was the executrix of her former husband, and her second husband was gone out of the kingdom, a *ne exeat* was granted against her alone.(d)

Where goods, chattels, &c. were bequeathed to an executrix; in trust for A. and upon an account settled between them, she acknowledged to have 640*l.* and threatened to go abroad, a writ of *ne exeat* was granted and marked in 640*l.*(e)

A writ of *ne exeat regno* cannot be obtained against an attorney, upon a legal demand, on the *ground that he is privileged, *187 and cannot be arrested.(f)

If a man has been arrested upon an equitable demand, as if it had been a legal demand, and is discharged, he cannot be taken on a writ of *ne exeat*.(g)

3. Motion for a Guardian.

On the filing of a bill by an *infant*, he may immediately, and before the appearance of the defendant, move to have a guardian assigned him.(h)

The plaintiff may also move for an order to appoint a guardian for an infant defendant.(i)

(l) Roddam v. Hetherington, 5 Ves. 95.

(m) Stewart v. Stewart, 1 Ball and Beatty, 73.

(a) Sedgwick v. Watkins, 1 Ves. jun. 11. S. C. 3 Bro. C. C. 11.

(b) *Ib.*; and see Lake v. Decon, Toth. 158.

(c) Holman v. Audley, Toth. 160.

(d) Jerningham v. Glass, 3 Atk. 409. S. C. Amb. 62.; and see Moore v. Meynell, 1 Dick. 30.

(e) Taylor v. Leitch, 1 Dick. 380.

(f) Gardner v. —, 15 Ves. 444.

(g) Ammeck v. Bartley, 8 Ves. 594.

(h) Pendleton v. Mackrory, 2 Dick. 736.

(i) Williams v. Wynne, 10 Ves. 159.

4. *Motions for a Receiver.*

A receiver may be appointed *before* or *after* an answer, and *after a decree*; (k) but as the nature of the appointment, and the duties of a receiver, are the same, in whatever stage of the suit he is appointed, all the doctrine on the subject will here (to prevent repetition) be brought together.

The power of appointing a receiver is a discretionary power exercised by the court, with as great utility to the subject as any sort of authority that belongs to them, and is provisional only for the more speedy getting in of a party's estate, and securing it for the benefit of such person who appears entitled, *188 and does not affect the right; (l) it *does not, for instance, alter the possession of the estate in the person who shall be found entitled at the time the receiver was appointed, so as to prevent the statute of limitations running on, during the right in dispute. (m)

There is no instance (except in the case of lunatics and idiots) (n) of the appointment of a receiver, unless where there has been a bill filed; (o) nor is it usual to appoint a receiver before answer; but there are several cases where the court will, *before answer*, appoint a receiver upon affidavits, as in cases of *fraud*, combined with *danger* to the property; (p) or, where a defendant absconds, to avoid being served with process. (q)

In a case where a suit was pending in the ecclesiastical court to recall a probate, on the ground that the testator was insane, Lord *Rosslyn* appointed a receiver before answer, and without notice of the motion. (r)

So, a receiver has, before answer, been appointed upon the bill of a purchaser, *pendente lite*, viz. a suit instituted by the

(k) See *Cooke v. Gwyn*, 3 Atk. 690.

(l) *Ship v. Harwood*, 3 Atk. 564.

(m) 2 Atk. 15, *Sharp v. Carter*, 3 P. Wms. 379.

(n) 1 Atk. 578.

(o) *Ex parte Mountfort*, 15 Ves. 446. *contra*, *Fitcher v. Helliar*, 2 Dick. 580.

(p) *Lloyd v. Passingham*, 16 Ves. 69.; and see *Vann against Barnet*, 2

Bro. C. C. 158. *Hagonin v. Baseley*, 13 Ves. 108. and *Middleton v. Dodswell*, 13 Ves. 266. the case of an executor.

(q) *Maguire v. Allen*, 1 Ves. and Bea. 76.

(r) *Palmer v. Price*, mentioned arg. in anonymous case, 12 Ves. p. 4.

wife of the vendor, claiming under a² settlement after marriage, and therefore voluntary.(s)

*On the filing of a bill, the court will on application appoint *189 a receiver of the rents and profits of an *infant's* estate.(t)

If, in the case of an executor, any *misconduct, waste, or improper disposition* of the assets is shown, the court will instantly interfere and appoint a receiver; but the court will not appoint one, merely on the ground that the executor is in *mean circumstances*.(v)

Receivers, managers, &c. in cases of partnership, or foreclosure, are appointed only with a view to the relief prayed by the plaintiff, in order to *wind up* and *dispose of* the concern, and not with a view to *carry on* and *continue* the concern.(w) A receiver, therefore, of partnership stock and effects will not be ordered while a trade is going on, unless upon the very grossest abuse, for it would destroy the trade.(x)

When, on a bill to take a partnership account, the partnership is admitted, or is on an issue established, a motion may be made by the plaintiff, to restrain each party from receiving the partnership effects, and for the appointment of a receiver of the outstanding estate.(y)

Where, in a partnership between two persons, both the partners are dead, and a suit is instituted for an account, a receiver will be appointed; *but where there is a copartnership, there is *190 a confidence between the parties, and, if one dies, no receiver will be appointed.(z)

A second mortgagee cannot, in general, have a receiver, if the mortgagor be living, without the consent of the first mortgagee;(a) but if the estate is in the possession of the first mortgagee, and he has been negligent in his accounts, and cannot swear what sum is due to him, the court, at the instance of a second mortgagee, will appoint a receiver.(b)

(s) *Metcalf v. Pulvertoft*, 18 Ves. 180.

(t) *Anon.* 1 Atk. 469. 588. *Ex parte Whitfield*, 2 Atk. 315.

(v) *Anonymous*, 12 Ves. 4.; and see *Hathornwaite v. Russell*, 2 Atk. 126. S. C. Barn. 334.

(w) *Walters v. Taylor*, 15 Ves. p. 11.

(x) *Oliver v. Hamilton*, 2 Anstr. 453.

(y) *Peacock v. Peacock*, 16 Ves. 57.

(z) *Philipa against Atkinson*, 2 Bro. C. C. 272.

(a) *Philippe v. Bishop of Bath and Wells*, 2 Dick. 603.

(b) *Codrington v. Parker*, 16 Ves. 469.

If a mortgagee, though he cannot state with any great precision what sum is due to him, can say, upon oath, he believes a sum of money is due, and his mortgage is not satisfied, the court will not take the possession from him, even for the purpose of placing it in the hands of the court; but where he cannot say a shilling is due, the court will take possession of the estate, and, if it is a *West-India* estate, will appoint a consignee.(y)

Where a receiver is appointed at the instance of a mortgagee, the master generally appoints such person as the mortgagee proposes, unless there is a personal objection to the man;(z) but if such receiver embezzle, or otherwise wastes the rents and profits, the loss, it seems, will fall upon the mortgagor,(a) for the receiver is an officer of the court.(b)

*191 *The court will not appoint a receiver on account of a dispute in the *ecclesiastical court* respecting *probate*. If the litigation in that court is likely to be long, it has jurisdiction to grant administration *pendente lite*, and the administrator may maintain an action to recover debts, by which means no loss can fall upon the personal estate.(c)

If *probate* has been obtained, no administrator *pendente lite* can be appointed, and in such case, where a will had been obtained by fraud, a receiver was appointed.(d)

On a bill by an heir at law to controvert a will, unless there are other circumstances, the court will not appoint a receiver.(e)

If the person in possession of real estate made assets has, by his answer, stated the circumstances of the property to be such, that the court cannot avoid seeing that, in the administration, both the real estate and the rents and profit must become responsible to the demand, the court will, in the first instance, put a receiver upon the estate.(f)

A receiver may be appointed of an estate in the *East Indies*. The usual way is to appoint some person in this country, within the jurisdiction, to be the receiver, and he appoints his own agent in *India*. In such a case, it was also thought proper to have a

(y) *Quarrel v. Backford*, 13 Ves. 377.

(d) *Knight v. Duplessis*, 1 Ves. 324.

(z) *Wilkins v. Williams*, 3 Ves. 522.

(d) *Powis v. Andrews*, mentioned *ib.*

(a) *Riggs against Bowater*, 3 Bro. 325.

C. C. 365.

(e) *Knight v. Duplessis*, 1 Ves. 324.

(b) *Hutchinson v. Lord Massareene*,

(f) *Jones v. Pugh*, 8 Ves. 71.

2, Ball and Beatty, 55.

reference to the master, to inquire what should be the term beyond which *the receiver should not be permitted to let, as this *192 would prevent the necessity of applying to the court, from time to time, for permission to let. (g)

One tenant in common, after a bill filed, may move that his cotenant in common, who is in possession, may give security for his share of the rents, or have a receiver appointed.

The court will not direct a receiver of an estate, where the matters in dispute depend on a mere *legal title*, unless strong grounds of title is shown, and the rents are in danger. (h)

Where an order is made for a receiver, it is referred to the master to approve a proper person; and if the master approves of a person proposed as receiver, the master's judgment, though not absolutely conclusive, will not be disturbed, unless upon *special grounds* and a *strong case*; (i) he must be shown he is an improper person. (k) Small discussions, as to who should be receiver and have the allowance, are not proper questions for the chancellor's consideration.

The master, however, in forming his judgment, is much influenced by the approbation of a majority of the parties more particularly interested in the appointment. (l)

*In general, trustee will not be appointed a receiver, whether *193 he is sole trustee, or jointly such with others; (n) but, it seems, it is no objection to a receiver, that he is a trustee to *preserve contingent remainders*, or, as trustee, has a power to *sell or exchange*; but where there is a power to the trustee to *lease*, in such case he will not be appointed receiver; (o) and in those cases where a trustee is appointed, he is not allowed any emolument, unless no one else can be procured, who will act with equal advantage to the estate. (p)

The being in parliament, and a practising barrister, (q) does

(g) ——— v. Lindsey, 15 Ves. 91.

(l) 1 Turn. and Ven. 148.

(h) Mordaunt v. Hooper, Ambl. 311; and see 13 Ves. 105.

(n) ——— v. Jolland, 8 Ves. 72; and see Anon. 3 Ves. 515.

(i) Garland v. Garland, 2 Ves. jun. 137. Bowersbank v. Collasseau, 3 Ves. 164. Tharpe v. Tharpe, 12 Ves. 317.

(o) Sutton v. Jones, 1 Ves. 584.

(p) Sykes v. Hastings, 11 Ves. 363.

(k) Thomas against Dawkin, 3 Bro. C. C. 508. S. C. 1 Ves. jun. 452. Cruise against Bishop of London, 2 Bro. C. C. 253.

(q) As to a barrister, see Wilkins v. Williams, 3 Ves. 588. and Garland v. Garland, 2 Ves. jun. 137.

not absolutely disqualify such a person from being a receiver, but are circumstances to be considerably regarded.(r)

A *solicitor* in the cause cannot be a receiver.(s)

The course of the court requires a security by the receiver, and two securities in a recognisance; and taking an assignment of a mortgage belonging to the receiver, instead of pursuing the usual course, has been deemed improper.(t)

*194 There are cases, however, where a receiver *will be appointed on giving his own recognisance only; as where they are persons named by the parties.(u)

Surtees for a receiver will not be discharged at their request;(u) but when the office of the receiver is at an end, and his accounts are finally settled, he may apply by petition to have his recognisance vacated.(w)

It is the *duty* of a receiver, regularly to pass his accounts, according to the mode prescribed by the general order of court, dated the 22d of April, 1796.(x)

There is also a general order of court, dated 23d of April, 1796, in the following words, viz.

"That the several masters of this court shall hereafter fix the days on which all receivers in their respective offices shall *annually* procure their accounts to be delivered unto the masters,(y) and also the days upon which such receivers shall pay the balances appearing due on the accounts so delivered in, or such part thereof as the master shall certify proper to be paid by them; and it is further ordered, that with respect to such receivers as shall neglect to deliver in their accounts, and pay the balances thereof, at the times so to be fixed for that purpose,

*195 as aforesaid, the several masters to whom such *receivers are accountable, shall from time to time, when their subsequent accounts are produced, to be examined and passed, not only disallow the salaries therein claimed by such receivers, but also charge interest at five per cent. per annum upon the balances, so neg-

(r) *Wynne v. Lord Newborough*, 15 Ves. 283.

(s) *Griffith v. Griffith*, 2 Ves. 400.

(w) *Turn. and Ven. Pract.* 1 vol.

(t) *Gayland v. Garland*, 2 Ves. jun. 152.

(x) *Vide General Order*, 15 Ves. 276.

(i) *Mead v. Lord Offery*, 3 Atk. 237.

(y) See the General Order on this

(u) As in *Countess of Carlisle* against Lord Berkeley, Ambl. 599. S. C. 1 Dick. 68.

subject, 15th December, 1792; 4 Bro. C. C. 157.

lected to be paid by them, during the time the same shall appear to have remained in the hands of such receivers; and it is further ordered, that every receiver, acting under the authority of this court, shall each year procure his annual account of receipts and payments respecting the estate intrusted to his care to be examined and settled by the master whose duty it may be to inspect the same, within the space of six months next ensuing the time appointed by such master for the delivering of such account into his office, as is hereinbefore directed; and in case any receiver shall at any time hereafter neglect so to do, a certificate of such default is hereby required from the master in whose office such neglect or default shall happen."

Though all parties express themselves satisfied with the conduct of a receiver, yet in a case where a party had misbehaved, by keeping money in his hands, Lord *Thurlew* said, "though the parties are satisfied, I will make them more so, if I find he has kept money in his hands longer than he ought." (y)

In one case, Lord *Eldon* was not merely of *opinion that a *196 receiver who does not pass his accounts would be liable to pay interest, but that it would be a question, *how far the solicitor was liable.* (x)

If a receiver makes remittances to a banker, to his own credit and use, and not to a *separate account* for the trust, he will be charged with a loss, by the failure of the banker. (a)

A receiver has been held not to be liable by the failure of testator's banker, with whom the receiver, when going to *London* to pass his accounts, deposited the money, intending to draw for it. (b)

If a receiver of the personal estate of a testator does not, pursuant to the order, pass his accounts and pay in the balances, he will lose his salary, and be charged with interest, but not upon each sum from the time it was received, according to the strict rule applicable to a receiver of annual rents and profits; but as an executor would be charged in respect of his receipts. (c)

(y) *Fletcher v. Dodd*, 1 Ves. jun. 85. *Plymouth*, 3 Atk. 480. 8. C. 1 Dick.

(x) ——— v. *Jolland*, 8 Ves. 72. 120.

(a) *Wrea v. Kirtón*, 11 Ves. 377. (b) *Knight v. Earl of Plymouth*, *mis-*
overruling, as it seems, *Knight v. Lord*
Good, 3 Ves. 586.

(c) *Potts and Leighton*, 15 Ves. 273.

It is not necessary for a receiver to wait till, at the instance of some other person, an order is made upon him to pay in money received by him, because he may, upon *his own* application, obtain an order for that purpose.(d)

- *197 *If it be necessary for a receiver to *bring*, or to *defend*, an ejectment, he must by motion apply for the leave of the court so to do;(e) and if the parties interested, being adult, consent, a reference will be made to the master to see if it will be for their benefit.(f)

It is the duty of a receiver to let the estate, of which he is receiver, to the best advantage; but he must apply to the court.(g) and he cannot turn out tenants without an application to the master.(h)

A receiver, it seems, cannot *distrain* without an order.(i)

A receiver is not entitled to any compensation for his trouble, unless where what he does is in pursuance of an order of the court.(k)

If a receiver is appointed, and the owner of the estate is in possession of part of the premises, application should be made to the court, that the owner should deliver possession to the receiver; who cannot distrain on the owner in possession, as he is not tenant to him.(l)

- *198 Receivers are not, in general, permitted to apply *the trust fund in repairs to any considerable extent, without a previous application.(m) It is different as to managers in the *West Indies*, who have a discretion in regard to their expenditures.(n)

A receiver is not, it seems, obliged to pay any thing without an order of court.(o)

Where a receiver, for the purpose of remitting a considerable sum, paid the money to a creditable tradesman, and obtained

(d) *Ib.* 274.

(e) *Angel v. Smith*, 9 Ves. 336. S. C. MS.

(f) *Wynne against Lord Newborough*, 3 Bro. C. C. 88. Anon. 6 Ves. 287.

(g) *Morris v. Elms*, 1 Ves. jun. 139.

(h) *Wynne v. Lord Newborough*, 1 Ves. jun. 165. S. C. 3 Bro. C. C. 88.

(i) *Hughes v. Hughes*, 3 Bro. C. C.

87.; but see S. C. 1 Ves. jun. 161. and *Pitt v. Snowden*, 3 Atk. 750.

(k) *In re, Ormsby*, 1 Ball and Beatty, 189.

(l) *Griffith v. Griffith*, 2 Ves. 401.

(m) *Attorney General v. Vigor*, 11 Ves. 563. *Blunt v. Clithero*, 6 Ves. 802. See *Morris v. Elms*, 1 Ves. jun. 139. and *Hicks v. Hicks*, 3 Atk. 274.

(n) *Morris v. Elms*, 1 Ves. jun. 139.

(o) *Fletcher v. Dodd*, 1 Ves. jun. 85.

bills from him on *London*, which tradesman afterwards failed, the receiver was held not responsible; but he would have been, if any fraud or collusion had appeared, and that the money was lost by his wilful default.(p)

A party claiming an interest in estates in the hands of a receiver, or sequestered, (for the same proceeding may take place in regard to sequestered estates,) an order is obtained, upon notice of motion, to come in and be examined, *pro interesse suo*, wherein a time is limited for filing interrogatories. After the examination, the other side hath liberty to examine witnesses, to falsify the examination, and a commission of course issues, if necessary, wherein the claimant may join, if he thinks fit; and the commission, if any, *is returned. Publication passes *199 by order. Then an order is made to refer it to the master to look into the examination and depositions, and to certify whether the claimant hath made out any, and what interest in the premises, or in any and what part thereof. The report of the master is set down to be heard for directions, and the court pronounces a final order.(q)

5. Motion to amend Bill.

A bill may be amended before the defendant has appeared.(r)

If a demurrer to a bill be allowed, the plaintiff, it has been held, in a case in which Sir *Joseph Jekyl* was defendant, may amend his bill;(s) but, in other cases, it appears to have been decided differently.(t)

6. Motion to take Bill Pro Confesso.

Formerly, on original bills, or bills of revivor, if the defendant did not appear, but stood out all process of contempt, the bill could not be taken *pro confesso*; but if he appeared, and then stood out for want of an answer, it might;(z) but by the statute, (5 G. II. c. 26.) if a defendant, after the *usual process *200

(p) *Knight v. Lord Plymouth*, 3 Jekyl, 2 P. Wms. 300. Nels. 114. Ib. Atk. 480. approved in *Belchier* against 160.

Parsons, Amb. 219.

(q) *Hunt v. Priest*, 9 Dick. 540, 1.

(r) 1 Eq. Abr. in marg. p. 39.

(s) *Lord Kenningby v. Sir Joseph*

(t) See case cited in note to 2 P.

Wms. 300; and see *Smith v. Barnes*, 1

Dick. 67.

(z) *Anon.* 2 Freem. 127. Ch. Rep.

65.

of contempt, does not appear, and is brought into court by *habeas corpus*, and refuses to enter his appearance, the court may enter it for him, and proceedings may be had, as if he had appeared; and if persons *abscond* to avoid process, the statute prescribes certain steps to be taken, and if the defendant does not appear, an order will be made that the plaintiff's bill be taken *pro confesso*.

To obtain an order, where the defendant absconds, for taking the bill *pro confesso* under the statute, the affidavit must state that the defendant has been in *England* within two years before the subpoena; (a) and it is not sufficient that the party making the affidavit, swears he was informed, and believes, that the defendant has withdrawn himself in order to avoid being served with the process of the court, but it must likewise be sworn, by whom the party deposing received such information. (b)

If a defendant having privilege of parliament, stands out process of contempt, the bill may, on motion, according to a recent act, be taken *pro confesso*; but the act (c) only extends to cases where the bill is filed for *discovery only*, and not to bills for *relief*. (d)

*201 If, where an order is made to take a bill *pro confesso*, the defendant moves to discharge it, on payment of costs, and offers to put in an answer, the court, it seems, will see what answer is proposed to be put in; (e) but if the delay has been extravagantly long, the court, it seems, will not interfere. (f)

Where a party is in custody for not putting in his answer, and a motion is made to take the bill *pro confesso*, it is not sufficient to produce a certificate that the answer is on the file, unless there has been a payment or tender of costs; but if the plaintiff has taken an office copy of the answer, it cannot be treated as a nullity. (g)

If there be more than one defendant, and all the process for contempt has issued, the bill may, on motion, be taken *pro con-*

(a) *Bishop of Winchester v. Beaver*, 5 Ves. 113. *Naish v. Naish*, 5 Ves. 1.

(b) *Burton v. Malvon*, 8 Ben. 401. 402.

(c) 45 Geo. III. c. 124. s. 5.

(d) *Jones v. Davis*, 17 Ves. 388.

(e) *Hearne v. Ogilvie*, 11 Ves. 77.

(f) *Williams against Thompson*, 2 Bro. 279.

(g) *Sidgier v. Tyto*, 11 Ves. 202.

ferre; but if there are more defendants, the cause must be set down. (h)

After two insufficient answers to an information, an order may be obtained to set down the cause, in order that the information should be taken *pro confesso*. (i)

Where a defendant, to prevent his being brought up by an *alias pluries habeas corpus*, as often as he was turned over to the feet, removed himself back to the king's bench, it was ordered, if he *did not put in his answer by the time an *alias pluries* *202 would have issued, the bill should be taken *pro confesso* against him. (k)

7. Motion to examine Witnesses, *de bene esse*.

We have already seen, (l) that where a party is apprehensive that witnesses to important facts may die *before any suit or action is brought*, and before he can have an opportunity of examining such witnesses, in the ordinary way, a bill lies to perpetuate such testimony; and where, *after a suit is commenced*, but before, in the regular course of proceedings, the witnesses can be examined, their testimony is likely to be lost, the court, on motion, supported by affidavit, will grant a commission to examine such witnesses *de bene esse*; and this practice has long been in use, as appears by a case in *Carsy*. (m)

Where the application is on the ground of age, the motion requires a notice. (n)

A witness who is *old*, (seventy years,) or infirm, and in danger of dying, or who is the only witness on the subject, (p) or about to quit the kingdom, (q) or go to Scotland, (r) will, on a motion for that purpose, supported by affidavit, be ordered to be examined, *de bene esse*. And in one case, two *persons, the only persons *203

(h) *Seagrave v. Edwards*, 3 Ves. 372.

(i) *Attorney General v. Young*, 3 Ves. 208. The lease contra of *Hawkins v. Crook*, 2 P. Wms. 558. was shaken in *Davis v. Davis*, 2 Atk. 21., but this latter case was compromised. See *Helston v. Robinson*, 4 Vin. 446. pl. 2. and *Abergavenny v. Abergavenny*, 2 Eq. Abr. 179. pl. 5.

(k) *Pendergrast v. Saubergue*, 2 Dick. 536.

(l) *Ante*, 1 vol. 152. etc.

(m) P. 48. S. C. 1 Dick. 2.

(n) *Bellamy v. Jones*, 8 Ves. 31.

(p) *Shirley v. Lord Ferrers*, 3 B. Wms. 77, *Pearson v. Ward*, 2 Dick. 648. *Hankin against Middleditch*, 2 Bro. C. C. 641, *Bellamy v. Jones*, 8 Ves. 31.

(q) *Shelly v. —*, 13 Ves. 57. *Fitzhugh v. Lee*, Amb. 65.

(r) *Botts v. Verelst*, 1 Dick. 454.

who had knowledge of the material facts, were ordered to be examined *de bene esse*, without any regard to their age ;(s) and it seems, indeed, that wherever justice requires such examination, it will be granted :(t) but the court looks with some jealousy on these applications, and never permits them, unless upon absolute necessity, because the witness stands pledged to reswear what has been sworn.(u)

The *affidavit* in support of the motion must show that the particular person knows the fact, and (in general) is the only person who knows it; and it is not sufficient for the agent to swear, that he is *informed* by the witness that he can prove the particular fact, and the belief of the agent (not showing the ground of his belief) that no other person can prove it.(v)

It is a fundamental rule, that depositions *de bene esse* are not to be published, but where there is a moral impossibility to have an examination in chief :(w) as where the witnesses die before issue joined, or are beyond sea ;(x) and when depositions are allowed to be published, they cannot be read *at law*, unless it is proved to the satisfaction of the court that the witness could not
 *204 be examined at the trial.(y) On motion and affidavit, the officer in whose possession the original depositions are will be ordered to attend the trial, and if it is proved to the satisfaction of the court of law, that the witness is unable to attend, the original deposition may be tendered to the court.(z)

Where an *account* must necessarily be directed at the hearing, a commission to examine witnesses beyond sea, before the hearing, will not be granted, if it would delay the account; but application must be made for such commission after the account is directed.(a)

After answer, a motion may be made for a commission to examine witnesses abroad, even in an *enemy's* country ;(b) and,

(d) Lord Cholmondely against The Earl of Oxford, 4 Bro. C. C. 157.

(f) Shelly v. —, 13 Ves. 56.

(u) Bellamy v. Jones, 8 Ves. 32.

(v) Rowe v. —, 13 Ves. 261.

(w) Gason v. Wordsworth, 2 Ves. 337.

(x) See 2 Ves. 497. Marsden v. Ryand, 1 Vern. 331.

(y) Lutterell against Reynell and others, 1 Mod. 284. Andrews v. Palmer, 18 Ves. 22.

(z) Andrews v. Palmer, 16 Ves.; but see Price v. Bridgman, 1 Dick. 144. where order was different.

(a) Adams and Bohun, Barn. 270, 1.

(b) Cahill v. Shepherd, 12 Ves. 336.

in such cases, the practice seems to be, to direct the commission to the nearest neutral port.(c)

In these cases, it is not necessary to state the points to which the examination is intended to be applied,(d) but only the name of the witness, that his evidence is material, and that he is abroad.(e) On a bill for an injunction, the court *will not grant a commission to examine a witness in *India*, without a full affidavit of materiality.(f) *203

In one case, it was held, there must be an affidavit that the matter in question arose abroad; or it must appear so on the pleadings.(g) And in another case, where a commission was sought to prove that a legacy given by a codicil was meant to be *accumulative*, it was thought necessary that the plaintiff should swear she believed the legacy was meant to be so.(h)

When a commission is executed abroad, the person who takes it out, and returns it, must make an affidavit that he received it from the commissioners.(i)

Where witnesses were examined *de bene esse*, in *Sweden*, and the council of *Sweden* refused to let a commission be executed for examining them *in chief*, the depositions *de bene esse* were, on motion, allowed to be read.(k)

If a commission be granted to examine witnesses abroad, and, before examination, the plaintiff dies, yet, if the examination is previous to notice of the plaintiff's death, it will be effectual.(l)

If a commission to examine witnesses be taken out in the vacation, and has not a *certain return*, but only *sine dilacione*, it does not expire the first day of the following term; but may be continued *in execution the whole of the next term, to the last return, and, if necessary, the defendant may apply to enlarge publication till the last day of the term.(a) *206

Where commissioners on defendant's side do not, owing to

(c) — *v. Romney*, Amb. 62. C. C. 273; and see *Chitty v. Selwyn*,

(d) *Rougemont v. The Royal Exchange Assurance Company*, 7 Ves. 304. (h) *Coots against Coots*, 1 Bro. C. C. 449.

(e) *Oglethorpe v. Carleton*, 4 Bro. C. C. 33. See *Lassup and Depart*, Barnard. 192, 3, 4. (i) *Bourdillon v. Alleyne*, 4 Bro. C. C. 100.

(f) *Moody v. Steele*, 2 Anstr. 386. (k) *Gasson v. Wordsworth*, Amb. 108. S. C. 2 Ves. 325.

(g) *Akers against Chancery*, 8 Bro. (l) *Thompson's case*, 3 P. Wms. 196. (a) *Bagnaley v. Powell*, 3 Atk. 503.

fitness, attend, and depositions are taken *ex parte*, a new commission will, on motion, be ordered, if accompanied with an affidavit, that the defendant or his agents have not seen, heard, or been informed of the plaintiff's depositions, nor willingly will, &c. &c. till he hath examined, or till publication; but the new commission will be at the defendant's expense, and with liberty to the plaintiffs to cross examine.(b)

After the trial of an issue, an order may be obtained to *examine, de bene esse*, a witness above seventy, if being suggested there was an intention to move for a new trial.(c)

8. Motion for Payment of Money into Court.

In general cases, the court will not deal effectively between parties till the answer comes in; but a defendant has been ordered to pay money into court before an answer, in a case of gross fraud appearing on the affidavit of the plaintiff, and the affidavit in answer not satisfactory.(d)

If no affidavit had been made in answer, the court, it seems, would not have interfered.(e)

*207

*9. Motion for leave to sue in *Forma Pauperis*.

Before a suit is commenced, or in any stage of it, application may be made either by motion or petition to *sue, or defend, in forma pauperis*, on a proper affidavit, and a certificate of counsel, that there is just cause of suit.(f)

An order for suing *in forma pauperis*, must be founded on an affidavit of the pauper himself, that he is not worth 5*l.*: the affidavit of another person to that effect is not sufficient.(g) And this indulgence extends only to persons suing in their own rights, and not where they sue as executor or administrator.(h) An affidavit of a pauper convicted of perjury is admissible to enable him to sue as a pauper.(i)

If a pauper files an improper bill, he is liable to be commit-

(b) Grant against Barber, 2 Bro. C. C. 2.

(c) Anonymous, 6 Ves. 573.

(d) Jordan v. White, 6 Ves. 738.

(e) Ib. 739., and Vane v. Barnet, 2 Bro. C. C. 148.

(f) 11 Ves. 49. 13 Ves. 411.

(g) Wilkinson against Belcher, 2 Bro. C. C. 272.; and see 2 Bro. C. C. 22.

(h) Partridge v. Sheppard, 1 Dick. 136.

(i) Bowyer v. McEvey, T'Boill and Beatty, 582.

ted.(k) If the bill contains *scandal*, he must pay the costs of it.(l) If the bill be *amended* by leaving out some of the defendants, he must pay costs.(m) If it be *dismissed* at the instance of the pauper, he also pays costs.(n)

A party may be *dispaupered* at any time, if it be shown that he is of ability to prosecute the suit,(o) or misconducts himself.(p) If he is in possession of the property in question, he will not be considered as *a pauper.(q) Litigious conduct in a former *208 suit is not a sufficient ground to dispauper a person.(r)

10. Motion for a Reference of Title.

In the case of a bill for the specific performance of an agreement, containing merely an averment of the contract, and no special fact put in issue, a motion may be made by the plaintiff, before answer, for a reference of the title, upon his undertaking to do all such acts for the purpose of executing what the court thinks right, as if the answer was in, and the cause brought to a hearing.(s) This practice is modern, and first established by Lord *Thurlow*, where nothing but the title was in dispute. Where more than the title is in dispute, a claim of compensation, for instance, such a motion has been refused.(t)

Motions before answer on the part of the *defendant* may be,

1. Motion for Time to Answer.

In a *town* cause the defendant has eight days after his appearance to put in his answer. In a *country* cause he has until the first day of the next term after his appearance to move for a commission to take his answer. It is a motion of course. If the defendant is not prepared to put in his answer by that time, he may apply by motion or petition for further time, and is entitled *to three orders for time. In a *town* cause the first order *209 is for a month's further time; the second, for three weeks; and the third, for a fortnight. In a *country* cause, the first order is

(k) *Pearson v. Belchier*, 4 Ves. 630.

(g) 11 Ves. 49.

(l) *Tot.* 391.

(r) *Bowyer v. M'Evey*, 1 Ball and Beatty, 564. 16 Ves. 407.

(m) *Newl. Harr.* 391.

(s) *Bahnano v. Lumley*, 1 Ves. and Bea. p. 224.

(n) 3 Bro. C. C. 391. *Newl. Harr.*

(o) *Newl. Harr.* 390.

(t) — *v. Shelton*, 1 Ves. and

(p) *Corbett v. Corbett*, 16 Ves. 407. Bea. 516.

for six weeks; the second, for a month; and the third, a fortnight.

Where a defendant is ill, and unable to travel, he may obtain a *dedimus* to take his answer, though he lives within twenty miles of London. (z)

By an order of the court, (a) if a *third* application be made for time to answer, the defendant must consent to enter his appearance with the register, by his clerk in court, in four days, consenting that the sergeant at arms shall go against him as on a commission of rebellion, in case he doth not put in his answer by the time granted.

By the same order, on a *second* application for time to answer an *amended* bill, or after exceptions allowed, the defendant must consent to the same terms; but it is provided by the order, that this is not to preclude an application to the court under special circumstances.

The order does not mention peers; but it has been decided, that if a peer, a defendant, has obtained a third order for time, and has undertaken that if the answer is not put in a sequestration shall go, and afterwards puts in an insufficient answer, a motion for a *sequestration absolute* may be made. (b)

A defendant having had a third order for time, upon the terms of the order, and afterwards putting in an answer which is excepted to, and submitting to exceptions, is not entitled to farther time; (c) but a defendant, who has only had one order for time, and exceptions are allowed to his answer, he, not having previously been put under terms, is entitled, of course, to one order for time, and is not to come under terms before the second order.

And where the defendant put in a plea, upon which the plaintiff amended the bill, and paid costs, it was held, that this case did not come within the general order, but that the defendant was entitled to the same time to answer as upon an original bill, because the amended bill in such case stands in the place

(z) *Newb. Harr.* 163. and the MS. cases there cited.

(a) 23d January, 1784. 4 Bro. O. C. 544; see as to the inconveniences that led to this order, the anonymous case in 2 Ves. jun. 270.

(b) *Vid. Gregor v. Lord Arundel*, 8 Ves. 87.; and see *Portier v. De la Cour*, 1b. 603.

(c) *Portier v. De la Cour*, 8 Ves. 601.

of a new bill, the amendment being permitted to save expense.(d)

After two answers, reported insufficient, the defendant is not entitled to six weeks' time to answer.(e)

A commission to take an answer of a person resident in a foreign country at war with us, must be executed in that very country.(f)

Before the regular orders for time to answer *have been ob-^{*211}
tained, a special application may be made for time to answer an amended bill.(g)

If a bill be filed against a person who has been sent as ambassador to a foreign court, the defendant may move that proceedings should be stayed for a year and a day, unless the defendant should sooner return into England.(h)

Under an order merely for time to answer, a plea may be filed,(i) though it be in the nature of a plea in abatement;(k) but not, it seems, a plea of outlawry;(l) but under such an order, a demurrer could not be filed;(m) nor a demurrer to part, and an answer to the rest.(n) Where the defendant means to demur only, he must do that without asking time; unless where a very special ground is laid. If he asks time, he may ask time to answer only, or, for time to plead, answer, or demur; but if he applies for that order, he cannot demur alone;(o) though that rule may operate very inconveniently. Nor is he allowed to demur and answer only by denying combination, or some such trifling matters;(p) he must deny some material fact.(q)

*Though an order for time to answer only is inconsiderate.^{*212}

(d) *Spencer v. Bryan*, 9 Ves. 231.

(e) *Gregor v. Lord Arundel*, 6 Ves. 144.

(f) ——— *v. Romney*, Amb. 62.

(g) *Norris v. Kennedy*, 12 Ves. 66.

(h) *Pilkington v. Stanhope*, 2 Vern. 317.

(i) *Ason*, 2 P. Wms. 464. 1 Vern. 275. 3 P. Wms. 80.; and see *Roberts v. Hartley*, 1 Bro. C. C. 56.

(k) *De Miackwitz v. Udney*, 16 Ves. 355. and *Roberts and Hartley*, 1 Bro. C. C. 56.

(l) *Phillips v. Gibbons*, 18 Ves. 184.

(m) *Taylor and Milner*, 10 Ves. 444. 2 P. Wms. 464.

(n) *Kenrick against Clayton*, 2 Bro. C. C. 214. *Done v. Peacock*, 3 Atk. 726. contra, *Haster v. Weston*, 1 Vern. 463.

(o) *Taylor v. Milner*, 10 Ves. 447.; and see 2 Bro. 214.

(p) *Stephenson v. Gardner*, 2 P. Wms. 266.

(q) *Attorney General and ———*, Vin. Abr. tit. Ch. (W. s.) Cas. 2.

ly obtained, the court will not allow the mistake to be corrected. (r)

2. *Motion by Defendant to refer a Bill of Foreclosure, or for a specific Performance.*

By the stat. 7 Geo. II. c. 20. it is enacted, that upon a bill of foreclosure, the court, upon application by the defendant, having a right to redeem, and upon admission of the right and title of the plaintiff, may, before the cause shall be brought to a hearing, make such order or decree as the court could have made, if the cause had been regularly brought to a hearing; but it is provided, that the act shall not extend to any case, where the person against whom the redemption is prayed shall, by writing, to be delivered, before the money shall be brought into court, to the attorney or solicitor for the other side, insist, either that the party has no right to redeem, or that the premises are chargeable with any other sum, than what appears upon the mortgage, or shall be admitted, upon the other side, or where the right of redemption shall be controverted by different persons; nor shall be any prejudice to subsequent mortgages or encumbrancers. (s)

A reference to the master under this act is considered as proceeding upon an admission that the principal and interest is due upon the mortgage; and, therefore, the master cannot admit *evidence to dispute that (t) and where the bill is not confined merely to foreclosure, but sets up a distinct demand beyond the mortgage, no order or reference can be made under this statute. (u)

But, though, on a bill for a *foreclosure*, the defendant is entitled by the statute to come in upon motion, and have an immediate reference, yet, if he is in contempt for want of an answer, he cannot move for a reference. (v) The jurisdiction under the statute gives the effect of a decree for a foreclosure by a short order, and is the same as if the cause was brought to a hearing. The time for payment, therefore, may be enlarged on the usual terms. (w)

(r) *Phillips v. Gibbons*, 18 Ves. 126.

(s) See 4 Ves. 105.

(t) *Hewitt v. Hewitt*, 4 Ves. 105.

(u) *Barford v. Clegg*, 11 Ves. 489.

(v) *Hewitt v. McCartney*, 13 Ves. 569.

(w) *Wakewell v. Delight*, 3 Ves. 36.

So, under a bill for the specific performance of an agreement, where the only question is, whether a good title can be made, a reference to the title will, on a motion by the defendant, be ordered, though no answer has been put in.

3. Motion for a reference to see if two Suits are for the same Purpose.

Where several bills are filed by a rector, praying an account of tithes, a *special application* may be made, before answer, for a reference to the master, to examine and certify, whether the several causes, and some, and which of them may not be consolidated, and, in the mean time, that all **further proceedings* *214 may be staid; but the motion is not one of course.(x)

It has never been reduced to a general rule, nor ever can, that one bill should be depending only, where there is a number of creditors concerned.(y) A bill was brought by creditors in the court of *exchequer*, and a decree was made, and, then, other creditors brought a bill in *chancery* for the same purpose, and the court decreed the account, &c. the decree in the *exchequer* not being complete.(z)

There is a case in *Moseley*,(u) in which it has been laid down that, on the motion of a defendant, before answer, the court will refer it to the master to see if two suits instituted against the defendant are for the same matter; and Lord *Hardswicke*, in another case,(b) observed, that if two actions at law are brought in the same name and for the same matter, the pendency of one may be pleaded in abatement of the other; but if two such bills are brought, this court takes a more particular method; referring it to a master to inquire whether both are for the same matter; and if so, may stop proceedings in the last; but in a recent case this motion has been refused, the regular mode of obtaining the reference being said to be by *plea*.(c)

If two bills are brought on behalf of an *infant*, **by different* *215 *prochein amies*, the court refers it, to see if they are for the same

(x) *Keighly and Browne*, 16 Ves. 344.

(b) *Gage v. Lord Stafford*, 1 Ves.

(y) *Anon.* 3 Atk. 603.

545.

(z) *Coyne v. Jones*, Anbl.

(c) *Murray and Shadwell*, 17 Ves.

313.

353.

(a) P. 268.

matter, and which is most for the infant's benefit, and will stop the other.(x).

If there be a mortgage on a real estate, and a derivative mortgage, or assignment thereof, made by the mortgagee, the assignee or derivative mortgagee may bring two bills to have a redemption or foreclosure; nor can the court stop either of the suits, though, when the causes come to be heard, it would form an ingredient in the consideration of costs, which the court would order to be paid for the vexation.(y).

So, a man may bring two bills at his own expense, making use of the name of his assignor in one; nor can the court say he shall be stopped in that one.(x).

5. *Motion that Defendant, a Feme Covert, may answer separately.*

A married woman, if she cannot conscientiously swear to the answer drawn by her husband, may apply for an order to answer distinct and separate from her husband. If the husband insists on the wife putting in the answer he wishes, it is punishable as a contempt of court.(a)

If a husband is plaintiff in a suit, and makes his wife a defendant, she may answer separately, without an order of the court *216 for that purpose;(b) *but if she refuses to answer, an attachment, it seems, may issue in the first instance; but the better mode is first to move for an order that she may put in an answer.(c).

Regularly, the answer of a *feme covert*, if separate, ought to have an order to warrant it; but if the *feme covert's* separate answer be put in without an order, and the same be a fair and honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts of it, and replies to it, the court will not, at the instance of the wife, or of her executor, set it aside.(d)

6. *Motion for leave to defend in Forma Pauperis.*

A defendant, swearing he is not worth five pounds, his just debts being paid, and his wearing apparel excepted, will, on

(x) See 1 Ves. 545.

(y) *Ib.*

(x) *Ib.* 546.

(a) *Ex parte Halsam*, 2 Atk. 50.

(b) *Mitt.* 95, 96.

(c) *Annie v. Medlicott*, 13 Ves. 366.

(d) *Duke of Chandos v. Talbot*, 3

P. Wms. 370.

motion, or petition, be admitted to defend the suit *in forma pauperis*, nor is any certificate necessary, as it is on the application of a pauper plaintiff.

An affidavit that the defendant is not worth more than five pounds, except the matters in question, will not entitle him to defend *in forma pauperis*, where it appears the defendant is in possession of the land in question.(e)

7. Motion for Security for Costs.

If, on the face of the bill, the plaintiff appears *to be beyond *217 sea, or if, at the time of filing the bill, the defendant knows it, the defendant may (unless the plaintiff be a land or sea officer, or consul)(f) apply for security for costs; but the motion should be made before answer, or time prayed to answer, otherwise it is considered as waived.(g)

If, indeed, the defendant is a stranger to the fact, and it comes only to his knowledge in the course of the cause, the motion may be made when the information is required.(h)

If the plaintiff describes himself in his bill of a place where he cannot be found, he must give security.(i)

A plaintiff residing abroad is not compellable to give security where there are coplaintiffs, since they are liable to pay the costs.(k)

Merely living abroad has been holden not a sufficient ground for the motion, but that the party in his affidavit must swear, the person has left the kingdom since the filing of the bill, and is settled abroad;(l) but this, it seems, is not now the rule.

If an ambassador's servant brings a bill, he, being a privileged person, must give security to answer costs.(m)

*A plaintiff only going abroad, is not obliged to give security *218 for costs;(n) he must be resident abroad;(o) and in a case.

(e) *Spencer v. Bryant*, 11 Ves. 49.

(f) *Collbrook v. Jones*, 1 Dick. 154.

(g) *Anon.* 10 Ves. 237. *Craig against Bolton*, 2 Bro. C. C. 393. *Stackpoole v. O'Callaghan*, 1 Ball and Beatty, 586.

(h) *Mellorochy v. Mellorochy*, 2 Ves. 24. S. C. 1 Dick. 147.; and see *Lauregan v. Rekeby*, 2 Dick. 790.

(i) 2 Fowl. Ech. Prac. 370.

(k) 1 Dick. 282. *Walker v. Easterby*, 6 Ves. 612.

(l) *Anon.* 2 Dick. 775. *Beckman v. Le Grange*, 1 Austr. 359. See vid. *Green v. Charnock*, 1 Ves. jun. 377.

(m) *Goodwin v. Archer*, 2 P. Wms. 452. Mos. 175.

(n) *Hoby v. Hitchcock*, 5 Ves. 700.

(o) *Green against Charnock*, 3 Bro. C. C. 371.

where the plaintiff, after the filing of his bill, and an answer by the defendant, went to the *West Indies*, for the purpose of arranging his affairs, and informed his solicitor, (as the solicitor swore,) that he intended soon to return to this country, where he left his family, the chancellor refused to order security to be given for costs.(p)

Where the plaintiff was to be sent out of the kingdom under the alien act, security for costs was required.(q)

A plaintiff, out of the jurisdiction, must give security for costs to the extent of forty pounds, but not where there are coplaintiffs resident in *England* ;(r) nor will security for a larger sum be ordered, on the ground of the plaintiff being in distressed circumstances.(s) If, however, the plaintiff ask a favour of the court, some terms may be imposed ;(t) but it seems doubtful, whether the court has a discretionary authority in this respect, without referring to the master.(u)

If, after the answer is put in, the plaintiff goes abroad with an intention to reside, and is domiciled abroad, security for costs *219 will be *ordered ;(v) unless, by subsequent proceedings, the plaintiff's rights are recognised.(w)

Where a deed appeared to have been obtained by duress, and a bill was filed to have it delivered up, the plaintiffs in a cross bill had liberty to bring an action ; but the plaintiff was ordered to give security for the costs.(x)

Though a plaintiff be insolvent, a defendant, it seems, cannot oblige him to give security for costs,(y) not even if he becomes bankrupt ;(z) but in the case of an insolvent *amy*, who brings a bill in an infant's name, the defendant, it has been said, may apply to the court in order to have a solvent *amy* named.(a)

If a bill be filed, and dismissed with costs by default, and a new bill is filed for the same purpose, a motion may be made

(p) *White v. Greathead*, 15 Ves. 8.

(x) *Coleman v. Sarrell*, 1 Bro. 55.

(q) *Seilax v. Hanson*, 5 Ves. 281.

(y) *Squirrel v. Squirrel*, 2 P. Wms.

(r) *Walker v. Easterby*, 8 Ves. 612.

297. n. 1.

(s) *Ogilvie v. Hearne*, 11 Ves. 598.

(z) *Anon.* 2 Anstr. 407.

(t) *Gage v. Lady Strafford*, 2 Ves.

(a) *Turner v. Turner*, 2 P. Wms.

sen. 557.

297, 8. C. Selec. Cas. 49. 1 Str. 708.

(u) *Ogilvie v. Hearne*, 11 Ves. 600.

See vid. *Squirrel v. Squirrel*, in note 1.

(v) *Weeks v. Cole*, 14 Ves. 518.

to that case, 8. C. 2 Dick. 764. and

(w) *Gordon v. Plunket*, mentioned in

Anon. 1 Ves. jns. 409.

note to 1 Ball and Beatty, 567.

for time to answer, till a month after payment of the costs of the previous cause, in like manner as it is at law.(a)

If an administrator, against whom a bill is filed by creditors, for a discovery of assets, is about to leave the kingdom, to go to a place (though it be his place of abode) out of the reach of the process of the court, the court will, on motion, oblige the defendant, by his clerk in *court, to give a security, to be approved *220 of by the master, to abide the decree that shall be made at the hearing of the cause.(b)

8. *Motion to amend Plea.*

A defendant cannot withdraw his plea and put in another; but the court will, on motion, give him leave to amend the plea.(c) This is always allowed where a plea is sufficient in substance, but defective in form.(d)

It is not usual to refuse leave to amend a plea; but the party amending is tied down to a very short time.(e) And, it seems, on a motion to amend, the court expects that the form of the plea intended to be put in should be laid before the court, that the court may see whether it is material that the cause should be delayed for the purpose of admitting the amendment.(f) Where the plea is double and inconsistent, and will not admit of amendment, leave will be given to withdraw it, and plead *de novo*.(g)

When a plea has once been amended, farther time will be refused, and the defendants will be compelled to answer immediately.(h)

If a plea be overruled as informal, the defendant *cannot, *221 without leave of the court, plead the same matter again, more formally.(z)

9. *Motion to stay Proceedings till Cross Bill answered.*

If, after a bill filed, a cross bill is filed before an answer is put in to the original bill, proceedings in the original bill will, on mo-

(a) *Pickett v. Loggon*, 5 Ves. 702.

(b) *Baker v. Dumaresque*, 2 Atk. 66.

(c) *Patterson against Slaughter*, Amb. 293.

(d) *Murewether v. Mellish*, 13 Ves. 439.

(e) *Nobkissen v. Hastings*, 2 Ves. jun. 87.

(f) *Nabob of Arcot against the East-*

India Company, 3 Bro. C. C. 300, 1.;

and see 2 Bro. C. C. 143.

(g) *Ib.* 84.

(h) *Nabob of the Carnatic v. East-India Company*, 2 Ves. jun. 371.

(z) *Freeland v. Johnson*, 2 Anstr. 407.

tion, be stayed, till the answer comes in to the cross bill;(a) and where the answer has been put in, publication in the original will be enlarged to a fortnight after the answer to the cross bill comes in.(b)

10. *Motion to refer Bill for Scandal or Impertinence.*

An *original* or *amended* bill may, on motion, be referred for *impertinence*; but after an answer;(c) or even after an order for time to answer, the defendant cannot move to refer the bill for *impertinence*, though he may obtain a reference for *scandal*;(d) for *scandal* may be taken advantage of at any time.(e)

If a bill is scandalous, it is impertinent of course; but it may be impertinent without being scandalous. Nothing relevant is
*222 scandalous; and *the *maius* or *minus* of the relevancy is not material.(f)

Upon a bill being referred before the time for answering is out, the plaintiff cannot at the expiration of the time move for an injunction, as of course, for want of an answer; but is in the same situation as if the time for answering was not out, in which case it must be moved upon notice and affidavit of circumstances.(g)

If a bill be referred for impertinence, and the master reports it pertinent, the defendant may except generally, without specifying the parts of the bill which are impertinent.(h)

If the master reports that the bill is *impertinent* in the several parts of the same specified in the report, the defendant is entitled immediately after the report made, as a matter of course, to move that the six clerk with whom the bill is filed may attend the master therewith, in order that the master may expunge such part thereof as he has reported to be impertinent; and that it may be referred back to the master to tax the costs of the reference, and that the costs, when taxed, may be paid by the plaintiff.(i)

(a) *Ramkiscuscat v. Barker*, 1 Atk. 21.

(b) *Creswick v. Creswick*, 1 Atk. 291.

(c) *Abergavenny v. Abergavenny*, 2 P. Wms. 311.

(d) *Anonymous*, 5 Ves. 656. 2 Ves. 631. *Ferrar v. Ferrar*, 1 Dick. 173.

(e) *Fenhoulet v. Passavant*, 1 Ves. 24.

(f) *Fenhoulet v. Passavant*, 1 Ves. 24.

(g) *Neale against Wadeson*, 1 Bro. C. C. 574.

(h) *Mackworth v. Briggs*, 2 Atk. 181.

(i) *Mascott against Halhead*, 4 Bro. C. C. 222.

11. *Motion for leave to withdraw a Demurrer.*

A defendant will, on motion and payment of *costs, to be taxed, be allowed to withdraw a demurrer set down to be argued. (k) *223

12. *Motion for a Guardian to put in an Answer.*

If a defendant be infirm in body and mind, and incapable of putting in an answer, it is usual to have a guardian appointed to put in the answer: an order, on motion, that defendant may put in answer without oath or signature, not being a proper mode of proceeding. (l)

If an infant defendant be abroad, he cannot have a guardian assigned to put in his answer; (as the infant's appearance in court is necessary for that purpose;) but a commission must go. (m) So, if an infant be too ill to appear in court, a commission will be ordered. (n)

A motion for leave to answer by guardian must name the guardian. (o)

Idiots and lunatics defend by their committees, who will, on application to the court, be appointed guardians for that purpose; and if the idiot or lunatic has no committee, or the committee has an interest opposite to that of the person whose property is intrusted to his care, an order may be obtained for appointing another person as guardian for the purpose of defending the suit. (p)

*13. *Motion for a Reference to see if suit is for the Benefit of an Infant.* *224

If a bill be filed by a *prochein amy* on behalf of an infant, a motion may be made for a reference to a master to certify, whether the suit was brought for the benefit of the infant. (q) And if two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the court will direct an inquiry which suit is most for his benefit; and,

(k) *Downes v. East-India Company*, 6 Ves. 586. (o) *Brassington v. Brassington*, 2 Anstr. 369.

(l) *Wilson and Grace*, 14 Ves. 172. (p) *Mitford's Pleadings*, 95.

(m) *Tappen v. Norman*, 11 Ves. 563. (q) *Da Costa v. Da Costa*, 3 P. Wms.

See Vid. Tongma v. Piel, 9 Ves. 357. 140.

(n) *Duke of Marlborough v. Duchess of Marlborough*, 1 Dick. 71.

where that fact is ascertained, will stay proceedings in one of the suits.(r)

14. *Motion that Answer may be taken without Signature.*

In a case where the defendant went abroad in a hurry without signing his answer, the chancellor, on a motion for that purpose, which was consented to, ordered the *six clerk* to receive the answer without a *signature*. And in other cases, on a special application, the answer has been ordered to be taken *without oath or signature*.(s)

Demurrers.

We have already had frequent occasion to notice demurrers, nor will it be necessary to repeat what has been said, but the subject requires a separate consideration.

*225 *Whenever any ground of defence is apparent on the bill itself, either from matter contained in it, or from a defect in its frame, or in the case made by it, the proper mode of defence is by demurrer.*(a)

A *demurrer* must be signed by the counsel, but is without oath, and may be put in after the time for answering is out, and at any time, until the defendant is affected by process of contempt.(b)

A demurrer is always in bar, and goes to the merits of the case.(c) It must be founded upon this; that taking the charges in the bill to be true,(d) it is an absolute, certain, clear proposition, that the bill would be dismissed with costs at the hearing (e) and though the court has an idea, that, if the cause goes on, there may be some ground for a decree, yet, it seems, it is bound to say, whether upon the facts, as stated in the bill, if proved or confessed at the hearing, a decree would be made.(f)

(r) See Mitford's Pleadings, 27.

(d) See Utterson v. Mair, 2 Ves. jun.

(s) Bayley v. De Walkeirs, 10 Ves. 95.

441. Harding v. Harding, 12 Ves. 159.; and see 6 Ves. 171.

(e) Brooke v. Hewitt, 3 Ves. 255.

(a) Mitford's Pleadings, 99.

(f) Kemp v. Prior, 7 Ves. 248. The contrary doctrine in 2 Ves. 247. and in Prec. Ch. 589. is thought to have fallen incautiously from the court. See Mitf. Plead. 137. n. (k.)

(b) East-India Company against Henchman, 3 Bro. C. C. 372.

(c) Roberdeau v. Rous, 1 Atk. 543.

If a demurrer is put in, and overruled, it is never allowed to stand for an answer.(g)

So, a defendant cannot demur and plead,(i) or demur and answer(k) to the same matter, for the *answer will overrule the *226 demurrer;(l) and a demurrer to relief is overruled by an answer to the discovery of the facts,(m) or parts of the bill,(n) on which the relief is prayed; unless, perhaps, where the bill is for the performance of a parol agreement alleged to be partly performed, but the acts of performance, as stated in the bill, appear not to be such, and a plea of the statute of frauds, and an answer denying the alleged acts of part performance is put in.(o)

A demurrer must express the several causes of demurrer, and in case the demurrer does not go to the whole bill, it must clearly express the particular parts of the bill demurred to. If a demurrer is general to the whole bill, and there is any part, either as to the relief, or the discovery, to which the defendant ought to put in an answer, it is generally considered that the demurrer, being entire, must be overruled. But there are instances of allowing a demurrer in part, and a defendant may put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes. For the same ground of demurrer frequently will not apply to different parts of a bill; though the whole is liable to a demurrer; and in this case, one demurrer may be overruled upon argument, and another allowed.(p)

A demurrer admits all those facts that are well *pleaded,(q) *227 and the facts alone, without the conclusion of law.(r) Where, therefore, it is inexpedient to admit the facts stated in the bill, the party should insist by his answer that he is not bound to answer.(s)

(g) Anon. 3 Atk. 530.

(h) Dormer v. Fortescue, 2 Atk. 283.

Jones v. Earl of Strafford, 3 P. Wms., 80.

(k) 3 P. Wms. 80.

(l) Mitf. Plead. 171.

(m) Roberts v. Clayton, 3 Anstr., 715.

(n) Savage v. Smallbrooke, 1 Vern. 90.

(o) Lewis v. Clitherow, MS.

(p) Mitf. Plead. 173.

(q) East-India Company v. Hanchman, 1 Ves. jun. 209.

(r) Ford v. Peering, 1 Ves. jun. 78. Lord Raym. 18.

(s) See Honeywood v. Selwin, 3 Atk. 270.

After a *demurrer to the whole bill*, allowed, strictly speaking, the bill is out of court, as was insisted, though unsuccessfully, in a suit in which Sir Joseph Jekyl was defendant ;(f) but the defendant may, afterwards, with the leave of the court, put in a demurrer to *part of the bill* : (u) or, he may, by *answer*, insist that he is not obliged to answer. (v) This is an advantage a plaintiff has not at law, for there a demurrer, if judgment be against him, is a perpetual bar. (w)

It was, after great consideration, laid down as a rule by Lord *Thurlow*, (x) that a demurrer, if good to the *relief* prayed by a bill, is good also to the *discovery*, sought for the purpose of the relief; and this, Lord *Alvanley* termed "one of the wisest *228 rules ever established." (y) The *defendant, however, may waive the benefit of the rule as against himself, and may demur to the relief, and yet answer as to the discovery ; (z) but he cannot answer the discovery in part, and demur to part : (a) nor can he demur to a discovery only, and not to the *relief* prayed. (b)

A demurrer, *ore tenus*, must be to that which the defendant has demurred to on the record. If the cause of the demurrer on the record is not good, he may at the bar assign other cause ; but he cannot demur *ore tenus* upon a ground which he has not made the subject of demurrer on the record. (c) And, it seems, that if a demurrer *ore tenus* is allowed, it is *without costs*, because the demurrer on record was an ill one, and the plaintiff was not to blame in arguing it. (d)

(f) Lord Coningsby v. Sir Joseph Jekyl, 2 P. Wms. 300. ; and see Bancroft v. Warden, 2 Dick. 673.

(u) Baker v. Mellish, 11 Ves. 68. S. C. MS. Mitford's Pleadings, p. 17.

(v) Dormer v. Fortescue, 2 Atk. 284. Baker v. Mellish, 11 Ves. 73, 4. S. C. MS. ; but see Dolder v. Lord Hastingsfield, 11 Ves. 283.

(w) 2 Atk. 284.

(x) Foy against Penn, 2 Bro. C. C. 280. Price against James, 2 Bro. C. C. 319. Collis v. Swayne, 4 Bro. C. C. 480. ; and see Loker v. Roke, 3 Ves. 7. East-India Company v. Neave, 6 Ves. 185. Mucclstone v. Browne, 6 Ves. 63.

Barker v. Dacie, 6 Ves. 686. Baker v. Mellish, 10 Ves. 553.

(y) In Ryves v. Ryves, 3 Ves. 347.

(z) Hodgkin v. Longden, 8 Ves. 2. Abraham v. Dodgson, 2 Atk. 157.

(a) Abraham v. Dodgson, 2 Atk. 157.

(b) Morgan against Harris, 2 Bro. C. C. 124.

(c) Pitts against Short, 17 Ves. 213. contra, Broderip v. Phillips, mentioned in Mr. Raithby's note to 1 Vern. p. 78. n. 1.

(d) Tourton v. Flower, 3 P. Wms. 371. Vid. Durant v. Redman, 1 Vern. 78.

A *speaking demurrer* is a demurrer containing argument in the body of it, and is bad: as if the demurrer say, "in or about the year 1370, which is upwards of twenty years before the bill filed." (e) A demurrer is any thing but what appears on the face of the bill, is considered as a *speaking demurrer*. (f)

A demurrer (unlike a *plea*) cannot be good *in part, and bad *229 in part. (g) If, therefore, the demurrer extends to relief to which the party is entitled, it will be bad, though there is some relief prayed to which the plaintiff is not entitled. (h)

Having made these few observations on demurrers in general, we shall now treat of the several grounds of demurrer.

Demurrers may be, 1. For want of jurisdiction, either because no equity is apparent on the face of the bill, entitling the plaintiff to relief in equity, or because some other court of equity has jurisdiction. 2. To the person. 3. On account of a deficiency in the frame of the bill.

1. The matters over which a jurisdiction is possessed by courts of equity, have been copiously treated of in the preceding parts of this work, and need not here be enlarged upon (i) and it is scarcely necessary to observe, that a bill stating a case in which a court of equity gives relief, cannot be demurred to for want of equity; but wherever no sufficient ground is shown for a *court of equity to interfere, the defendant may demur *230 for want of equity in the plaintiff's case, to support the jurisdiction of the court.

If the case made by the bill be cognisable *solely* in a court of common law, or in any other court of ordinary jurisdiction, as the court of admiralty, or a court of prize, (k) a demurrer will lie.

It was observed by Sir Thomas Clarke, (l) that "in Sir John

(e) *Hadell v. Buchanan*, 2 Ves. jun. 83.

(f) *Brownword and Edwards*, 2 Ves. 245.

(g) *Earl of Suffolk v. Green*, 1 Atk. 451. 2 Atk. 388. *Ambl.* 176.

(h) *Todd v. Gee*, 17 Ves. 220.

(i) See a very masterly view of the general subjects of equity jurisdiction, in Mr. Mitford's (now Lord Redesdale's) *Pleadings*, from page 163 to 136. The noble author has announced his inten-

tion of republishing this treatise: Since the last edition, in 1787, there have been many decisions on the subject of his work, but few of them are any thing more than illustrations of the principles there laid down. Such a treatise, so admirable both in matter and style, ought to be perpetuated!

(k) See 7 Ves. 593.

(l) In *Bürgess and Wheate*, 1 Bl. Rep. 132.

Warden's case, before Lord Talbot, there was an objection for want of jurisdiction, and that the matter was properly triable at law; but it being disclosed that he had filed a *cross bill*, the court did not enter into that objection, but said the defendant had given a jurisdiction."

Where the wife and executrix of an attorney filed a bill for money due for business done by her husband as the defendant's attorney, a demurrer to the relief was allowed; as a remedy was given at law, under the statute of 2 Geo. II. for the better regulation of attorneys and solicitors.^(m)

So, if another court of equity has the proper jurisdiction, either immediately, or by way of appeal, the defendant may demur to the jurisdiction of the court of chancery; but demurrers of this kind are very rare; for the want of jurisdiction can *231 hardly appear on the face of the bill, "at least so conclusively as is necessary,⁽ⁿ⁾ to form a ground of demurrer.

If it appear on the face of the bill, that the defendant has no interest in the matters in question, a discovery from him is unnecessary, as he might be examined as a witness, and a demurrer will lie. This rule, and the exceptions, have before been adverted to.^(o)

Whether a bankrupt, who may be examined as a witness, can be made a party to a bill merely for a discovery, appears doubtful; but that he cannot be made a party to a bill seeking relief, seems clear.^(p)

It is a general rule, before alluded to,^(q) that a defendant is not obliged by a discovery to submit himself to a forfeiture, or any thing in the nature of a forfeiture.^(r) If, therefore, goods be bequeathed to a woman during widowhood, she cannot be compelled to discover, if she has since married.^(s)

But where there is a conditional limitation over of an estate, a demurrer will not lie to a bill for a discovery whether the condition has been performed.^(t)

So, a defendant may demur to so much of a bill as seeks a

(m) Parry v. Owen, 3 Atk. 740.

(n) Mitf. Plead. 134.

(o) See Ante, 1 vol. p. 172.; and see Whitworth v. Davis, 1 Ves. and Bea. 550. 7 Ves. 287.

(p) 1 Ves. and Bea. 545.

(q) Ante, 173.

(r) Boteler v. Allington, 3 Atk. 457.

(s) Moanins v. Moanins, 2 Ch. Rep.

(t) Lucas v. Evans, 3 Atk. 250.

discovery whether, after institution, &c. to *A.* he was not presented to two other *livings, and instituted; for such discovery *232 tends to show an avoidance of *A.*(*u*)

A demurrer lies also to a bill for a discovery of an assignment of a lease without license, if it does not expressly waive the forfeiture.(*v*)

Nor will the court compel a defendant to discover that which, if he answers in the affirmative, will subject him to the punishment of a crime; for it is not material that, if he answers in the negative, it will be no harm.(*w*) If the answer only tends to render him infamous, he is not compelled to answer.(*x*)

A defendant, therefore, may demur to a bill calling upon him to make an answer as to facts which amount to maintenance,(*y*) or *swary*;(z) subornation of perjury;(a) buying of pretended rights within the 32 Hen. VIII.;(b) ill-treatment of plaintiff, the wife of defendant,(c) or fornication.(d)

So, where the discovery sought was relative to a "*fruit club*," of which the defendant was a member, the object of which club (a club of *grocers) was to purchase all imported fruit, a de- *233 murrer to the discovery was allowed.(e)

A demurrer, also, will lie to a discovery of *acts of bankruptcy*, but not as to the trading.(f)

But an executor cannot protect himself against an account sought by creditors and legatees, on the ground that the transactions were such (smuggling transactions, for instance) that no account could have been maintained against the testator.(g)

2. If a plaintiff is not entitled to sue by reason of any *personal disability*, the defendant may demur. If, therefore, an infant,

(u) *Boteler v. Allington*, 3 Atk. 453.

(v) *Lord Uxbridge v. Staveland*, 2 Ves. 56.

(w) *East-India Company v. Campbell*, 1 Ves. 247. 8 Ves. 405. 14 Ves. 56.

(x) *Id.*

(y) *Wallis v. Duke of Portland*, 3 Ves. 494. and decrees confirmed in the house of lords, *vid.* 8 vol. Bro. Parl. Ca. p. 161. edited by Thomas, Sharp v. Carter, 3 P. Wms. 375.

(z) *Earl of Suffolk v. Green*, 1 Atk.

449. 8. C. 2 Eq. Abr. 79. *Chauncey v. Tabourdin*, 2 Atk. 393.

(a) *Baker v. Pritchard*, 2 Atk. 367.

(b) *Sharp v. Carter*, 3 P. Wms. 375.

(c) *Hicks v. Nelthorpe*, 1 Vern. 204.

(d) *Page and Neal*, 1 Vern. 107. *sed que.*

(e) *Cousins v. Smith*, 13 Ves. 542.

(f) *Chambers and others against Thompson*, 4 Bro. C. C. 434.

(g) *Joy v. Campbell*, 1 Ech. and Lefr. 330.

on a married woman, an idiot, or a denatic, exhibit a bill, and this appears on the face of the bill, and, no next friend or committee is named, the defendant may demur: and this ground of demurres, extends to bills for discovery merely, as well as to bills for relief; for the defendant, in a bill for discovery, necessarily, is, as before observed, entitled to costs, and would be injured by being compelled to answer a bill exhibited by persons who are incapable of paying costs. (d)

Where plaintiffs file their bill in a corporate character, and it appears, on the face of the bill, that they are not entitled to sue in that character, a demurrer will lie. (e)

*234 S. If a bill wants proper parties, it is demurrable, (unless the bill be for a discovery merely,) and such demurres need not point out the parties by name; but it is sufficient, if the objection points out who the individuals are, by some description, enabling the plaintiff to make them parties. (f)

We have already stated, who are the necessary parties to bills. (g)

If a plaintiff amends his bill, and states a matter arisen subsequent to the filing of the bill, which consequently, ought to be the subject of a supplemental bill, or a bill of revivor, a demurrer lies. (h)

If a bill be brought concerning things of distinct natures, against several persons, or against one, (i) it is demurrable, (k) but not if combination is charged, unless it is denied by the answer: (l) but no more than combination should be answered, or the answer would overrule the demurrer. (m) Those cases where unconnected parties have joined in a suit, are where there is one common interest among them all, centering in the point in issue in the cause. (n)

If an estate is sold in lots to different persons, a plaintiff

(d) Mitf. Plead. 186.

(e) 6 Ves. 738.

(f) Attorney-General v. Jackson, 11 Ves. 369; and see Mitford's Pleadings, 146: In Pyle v. Pyle, 6 Ves. 784, the rule was not considered as settled.

(g) Antb. p. 112 et seq.

(h) Mitf. Plead. 469.

(i) Ward v. Duke of Northampton, 2 Anstr. 469.

(k) Bark and Harris, Harb. 337.

(l) Powell and Ardenne, 1 Verd. 416.

confirmed in Lloyd and Rattray, 31 Exch. 19th Nov. 1788. Vid. Mr. Rattray's note to the above case in Vern.

(m) Hester and Weston, 3 Vern. 463.

(n) 3 Anstr. 477.

cannot include them all in one bill for a specific performance; there must be a distinct bill upon each contract. (o)

A vicar and a parson cannot join in one suit for tithes. (p)

So, where joint and separate demands cannot be comprehended in one bill, it is demurrable. (q)

If the court were to allow a plaintiff to demand by one bill several matters of different natures against several defendants, it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connexion. (r)

Demurrers to secondary bills, or, as they are termed, bills not original, will be noticed when we treat of those bills.

Pleas.

A plea must be signed by a counsel; and set down to be argued within eight days after it is filed; otherwise, it is considered as abandoned. (s) and the plaintiff is entitled to costs.

If a defendant submits to answer, he cannot afterwards put in a plea; but if, after an answer, the plaintiff amends his bill, the defendant may, it seems, notwithstanding his former answer, put in a plea to the amended bill. (t)

If a plea is replied to, it is thereby admitted to be good, if it be true; and the validity of the plea cannot be controverted. *236 but only the truth of it, as he proves it, on the plaintiff disproves it. (u) The replication in this case concludes the pleadings; though, if the truth of the plea is not supported, further proceedings may be had. (v) Even after the argument of a plea, and allowance thereof by the court, the plaintiff may, by filing a replication to the plea, oblige the defendant to prove its truth. (w)

Where the testator had pleaded to a bill, and died before the plea was argued, the executor was allowed to plead *de novo*. (x)

- (o) *Rayner v. Julia*, 2 Dick. 477. (t) *Ritchie v. Aylwin*, 15 Ves. 77.
 (p) *Gwillim*, 472. (u) *Sarkis v. Dymally*, 2 Bro. Gh.
 (q) *Shrimton v. Moly*, 3 Vek. 40n. 58. S. C. 2 Bro. Abn. 70. in Maty.
 323. (v) *Mordaunt v. Mordaunt*, 15.
 (r) *Mid. Pleas.* 347. (w) *Ward and Moul. Pract.* 1 vol.
 (s) *Jordan against Sawkins*, 3 Bro. 349.; and see *Gill. Rep.* 184.
 C. C. 372. (x) *Micklethwaite v. Calverly*, For. 2

A bill, so far as it is not contradicted by the plea, is taken to be true.(y)

Pleas must be good in *form* and in *substance*.

A plea may be good in part, and bad in part,(z) in which it differs from a demurrer, which, as we have seen, must be good for the whole, or void for the whole.(a) But if one part of the plea be inconsistent with the other, it will be overruled.(b)

*237 If a plea covers too much, it will be ordered to stand for part, and be overruled as to part,(c) or will be ordered to stand for an answer, with liberty to except.(d) The words, "*with liberty to except*," are added in these cases, to prevent the establishing it as a good answer,(e) as it otherwise would do.(f)

A plea may be to the *whole* bill, or to *part* only. A plea, therefore, with an exception, may be good, but a plea with an exception generally "of what is not answered," is not good, for in such case the court could not know what the plea covers, without looking into the answer;(g) but if the exception is clearly stated, it is unobjectionable.(h)

An answer overrules a plea, where the defendant answers the same things he insists upon in his plea.(i)

A *demurrer*, as we have seen,(k) is proper where the objection to the bill is apparent on the face of the bill; but a *plea* or answer must be resorted to, where an objection exists that is *not apparent* on the face of the bill.(l) A plea must aver facts to which the plaintiff may reply, and not, like a demurrer, rest on facts in the bill.(m)

In pleading, it has been said, there must be the same strictness as at law.(n)

(y) Plunket v. Benson, 2 Atk. 51.

(z) See 1 Dick. 249. Nobbison v. Hastings, 4 Bro. C. C. 254. 6 Ves. 403. 11 Ves. 70.

(a) Huggins v. York Buildings Company, 2 Atk. 44.

(b) 4 Bro. C. C. 254.

(c) Dormer v. Fortescue, 2 Atk. 234.

(d) Jones v. Pengree, 6 Ves. 580.

(e) Maitland v. Wilton, 3 Atk. 314.

(f) Bolton v. Lewen, 3 P. Wms. 239.

(g) See Salkeld v. Science, 2 Ves. 107.; and see 3 Atk. 70.

(h) Howe v. Deppa, 1 Ves. and Bea. 514.

(i) Clarichard and Burk, Vis. Abr. Tit. Chancery (W. A.) Ca. 1. Blackett v. Langlands, 1 Anstr. 14.

(k) Ante, p. 225.

(l) See Mitford's Pleadings, 136, 7.

(m) Ib. 235.

(n) Story v. Lord Windsor, 2 Atk. 638.

*The defence proper for a plea must be such as reduces the cause to a particular point, (o) which will bar the plaintiff's demand, and then it is of use, because, by having the judgment of the court upon that point, the parties are saved the expense of an examination. (p)

A plea does not deny the equity, but brings forward a fact, or a series of circumstances, forming, in their combined result, some one fact which displaces the equity. (g) Several deeds may be put in issue in a plea, if they draw to one conclusion. (r) The use of a plea being to save time, expense, and vexation, it must not contain two different and distinct points, but in such case an answer is proper: for where many circumstances go to the defence, it is of no utility, because there must be an examination afterwards, whether those circumstances be true or false. (s)

A plea, good as to the relief prayed by the bill, is good also to the discovery. (t)

All pleas, as they suggest a fact, so that fact, if disputed, may be generally replied to, whether the plea be to part or the whole of the bill, and the plaintiff may examine at large, (u) and go to a hearing. If *the party does not prove the fact which is ne- *239 cessary to support the plea, the plaintiff does not lose the benefit of a discovery, but the court directs an examination on interrogatories to supply that. (v)

If a bill of *revivor* be filed on the marriage of plaintiff, a plea to this bill may be filed, stating facts, a *settlement*, for instance, which requires a *supplemental bill*. (w)

Pleas in equity are of three kinds, and are either, 1. A plea to the jurisdiction; 2. A plea to the person; or, 3. A plea in bar. (a)

(o) *Chapman v. Turner*, 1 Atk. 64.

(p) *Anon.* 3 Eq. Abr. 78.

(q) *Whitbread against Brockhurst*, 1 Bro. C. C. 417, 418.; and see 1 Atk. 64. and 1 Bro. C. C. 274. and *Mitford's Pleadings*, 235.; and see *Rowe v. Tread*, 15 Ves. 378.

(r) *Leonard v. Leonard*, 1 Ball and Beatty, 325.

(s) *Anon.* 2 Eq. Abr. 178.; and see 1 Atk. 64. and 1 Bro. C. C. 404. & Anstr. 738.

(t) *Sutton v. Earl of Scarborough*, 9

Ves. 71. *Hodle v. Healey*, 1 Ves. and Bea. 639.; and see ante, 1 Vol. 175.

(u) *Ord v. Huddleston*, 2 Dick. 610.

(v) *Brownword v. Edwards*, 2 Ves. 243.

(w) *Marrowether v. Moffish*, 13 Ves. 435.

(a) 1 Eq. Abr. 37. in marg. *Ord v. Huddleston*, 2 Dick. 610. 96 Vin. Abr.

381.

A plea to the jurisdiction must show that the lands are, that the matters were transacted, or that the party lives out of the power of the court, and the reach of its process, as out of the kingdom, for instance, or in a county palatine, &c. (b) and though the defendant does not plead to the jurisdiction, yet, if a defect of jurisdiction appears at the hearing, the court will no more make a decree than where a plain want of equity appears. (c)

It has been truly observed, that a case which is not really such as will give a court of equity jurisdiction, cannot easily be so disguised in a bill as to avoid a demurrer. (d)

*240 If there is a particular jurisdiction, but the parties to litigate any question are both resident within the jurisdiction of the court of chancery, a plea to the jurisdiction does not tie as upon a bill concerning a mortgage of the island of Senke; both mortgagor and mortgagee residing in England. (e)

On a plea to the jurisdiction, it must be shown what other court has jurisdiction; (f) for the court of chancery being a superior court of general jurisdiction, nothing will be considered out of its jurisdiction which is not shown to be so. (g)

The court has no jurisdiction to give the possession of lands at St. Christopher's; a plea, therefore, to the jurisdiction, is sustainable. (h)

To a bill respecting chambers belonging to a society in an inn of court, a plea that the benchers have jurisdiction will hold. (i)

A plea of privilege of a scholar resident at a university may be pleaded, and need not be on oath. (k) But a plea of privilege by a defendant, foreign opposer in the exchequer, it was held, must be on oath. (l)

(b) *Ib.*; and see Mitford's Pleadings, 682. and 1 Ch. Cas. 41. Nels. 37. 66. Car. 60. there cited.

(c) *Peau v. Lord Baltimore*, 1 Ves. 467.; and see *Gross v. Rutherford*, 1 Ves. 470. and *vid. Tolson v. Williams*, 2 Vern. 484.

(d) Mitford's Pleadings, 103, 1.

(e) Mitford's Pleadings, 184. who cites 1 Ves. 304. 4 Inst. 213. and see 2 Vern. 494.

(f) *Earl of Derby v. Duke of Athol*, 1 Ves. 203.; and see 1 Ves. jun. 388.

Nabob of Carnatic v. East-India Company, 2 Ves. jun. 571. and S. C. 3 Bro. C. C. 801. *Strade v. Little*, 1 Vera. 68. 3 Atk. 662. 1 Ves. 78. 484. 2 Bro. C. C. 246.

(g) Mitford's Pleadings, 103. who cites 1 Ves. 204.

(h) *Roberdeau v. Rous*, 1 Atk. 548.

(i) 2 Bro. C. C. 246.

(k) *Pratt and Taylor*, 1 Ch. Cas. 237. S. P. 385.

(l) *Gibson v. Whitacre*, 1 Vern. 63.

Officers of the exchequer may plead their privilege of being sued there, but not if one of the defendants has no such privilege. (m)

A plea to the jurisdiction will not lie to a bill for a discovery merely; for, though the court may not have jurisdiction to give relief, it may yet entertain a bill for a discovery in aid of the court which can give relief, if the same discovery cannot be there obtained; as if the jurisdiction be in the king and council, where the defendant is not compellable to answer upon oath. (n)

To an information, a plea may be put in that a visitor, capable of doing complete justice, has jurisdiction to decide the matters in question. (o)

2. A plea to the person, must show that the party is disabled to sue, and is in the nature of a plea of abatement at law. (p)

A plea of *outlawry*, therefore, is good; (unless the plaintiff sue in *autre droit*, (q) or is merely named as a relator in an information, and does not therein sustain the character of plaintiff; (r) but it will not avail, if it took place in an action in regard to the same duty or thing for which relief is sought by the bill. (s)

This plea, it has been held, must be put in on oath; (t) but the majority of the decisions seem to *the contrary; (v) the outlaw- *242 ry must be pleaded, *sub pede sigilli*. (w)

In the *exchequer*, a plea of *outlawry* must be set down by the defendant; but the practice of the court of chancery is different. (x)

3. A defendant may plead, that the plaintiff has been *attainted* in a premunire of treason or felony, (y) or of an offence which occasions a forfeiture, as *manslaughter*; but a plea to the person,

(m) *Fanshaw v. Fanshaw*, 1 Vern. 246.

(n) *Mitford's Pleadings*, 124.; and see ante, 1 vol. p. 161.

(o) 3 Atk. 662. 1 Ves. 78. 464. 474. cited in *Mitford's Pleadings*, 185.

(p) 13 Ves. 437.

(q) *Killigrew v. Killigrew*, 1 Vern.

(r) *Mitf. Plead.* 186. and note (l.) *Proc. Ch.* 13.

(s) *Phillips v. Gibbons*, 16 Ves. 164.

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(t) *Parrot v. Bowden*, 1 Vern. 37.

(v) See *Pratt and Taylor*, 1 Ch. Cas. 237. S. P. 258.; and *Took v. Took*, 2 Vern. 198. *Bacon's Tracts*, 290. *Masters and Brunet*, 2 Freem. 143.

(w) *Attorney General v. Heath*, *Proc. Ch.* 13.

(x) *Chapman v. Lansdown*, 2 Anstr. 654.

(y) *Mitford's Pleadings*, 185.

in respect of a conviction for a capital offence, is judged of with equal strictness as if it were a plea at common law. (z)

A person attainted cannot be heard as a suitor in a court of justice, in prosecution of a civil right, but only for the mere purpose of reversing the attainder. (a)

4. A defendant may also plead, that the plaintiff is not the person he pretends to be, or has no right to the character he assumes. (b)

If, for instance, a plaintiff sues as heir or administrator, it may be pleaded, that he is not heir (c) or administrator, (d) or that the supposed intestate is alive. (e)

*243 *5. If a bill is filed in the name of any person incapable of instituting a suit *alone*; as an *infant*, a *married woman*, or an *idiot* or *lunatic*, so found by inquisition; the defendant may plead the infancy, the coverture, or the inquisition of idiocy or lunacy, in abatement of the suit. (f) If the disability in these cases appears on the face of the bill, a demurrer is proper; if it does not, a plea must be resorted to.

So, the *bankruptcy* of the plaintiff, (g) or an assignment under the insolvent debtor's act, may be pleaded, if the subject-matter of the suit arose before the bankruptcy or assignment. (h)

6. However the law may originally have stood, it is now settled, that *alien friends* are entitled to institute suits in the king's courts for the recovery of their rights. (i)

A plea, therefore, that the plaintiff was an *alien born*, and an *alien infidel*, is not good to a bill for a *personal demand*; (k) but the plea of *alienage*, to be effective, must aver, that the plaintiff is an *alien enemy*. (l)

Such a plea is good to a bill of discovery only, as well as to bills praying relief. (m)

(z) Butk v. Brown, 2 Atk. 390.

(a) See *ex parte Balloch*, 14 Ves. 452. 1 Taunt. 82.

(b) See Wyat's Pract. Reg. 376.

(c) Kinnearley v. Simpson, For. Rep. 35; and see ante, p. 164.

(d) Win and Fletcher, 1 Vern. 473.

(e) Ord v. Wilkinson, Forest's Rep. 90, S. C. alluded to under the name of Ord v. Hindlestone, Mitford's Pleadings, 189,

(f) Mitf. 188. who cites Pract. Reg. 276.

(g) Mitf. Plead. 190.

(h) 1 Anstr. 101.

(i) Daughbigny v. Davalloe, 2 Anstr. 462.

(k) Ramskissensent v. Barker, 1 Atk. 50.

(l) Butk v. Brown, 2 Atk. 397.

(m) Daughbigny v. Davalloe, 2 Anstr. 462.

7. The defendant may also plead that the plaintiff is *entirely incapacitated*, which must be certified by "the ordinary, *sub sigillo*," *244 and the plea holds, though the plaintiff sues in *outré droit*, as executor or administrator. This plea, like the plea of outlawry, ceases to be a bar when the disability is removed. (a)

Pleas in bar are either to the relief or the discovery. Pleas in bar to relief are, 1. An act of parliament; 2. A matter of record; 3. Matters in *pari*.

1. Any statute which is a bar to the plaintiff's demands may be pleaded with the averments necessary to bring the case of the defendant within the statute, and to avoid any equity which may be set up against the bar created by the statute. (a)

The statute of limitations (p) may, in many cases, be pleaded to an equitable demand; for, though the words of it do not apply to equitable demands, yet equity adopts it, or, at least, takes the same limitation in cases that are analogous to those in which it applies at law; (q) but no advantage can be taken of the statute, unless it is pleaded, or insisted on by the answer. (r)

There is no statute of limitations to bar a legal real charge. In equity, therefore, such a bar is never permitted. (s) But from length of time presumptions may be raised which may exclude the demand after long acquiescence, but not where all presumption of release or payment is excluded. (t) *The statute *245 of Hen. VIII. concerns only *customary rents* between lord and tenant. (u)

In a case where the testator died in 1786, and probate not taken out till 1802, the executor was allowed to plead the statute of limitations to a bill filed, because the defendant had possessed the personal estate, and therefore might have been sued as executor *de son tort*, previous to 1792. (v)

A bill depending six years in chancery is not sufficient to take the debt out of the statute of limitations. (w)

(a) Mifford's Pleadings, 186, 7.

(i) 10 Ves. 469.

(a) Mifford's Pleadings, 214.

(u) 2 Vern. 226.

(p) 21 Jac. I. c. 16.

(v) Webster v. Webster, 10 Ves. 93.

(q) Sh. Stackhouse v. Bampton, 10 A. C. 135.

Ves. 466, 7.

(w) Anon. 2 Atk. 1. contra, Anon.

(r) Prince v. Haylin, 493.

1 Vern. 53.

(s) 19 Ves. 467; and see Collins v. Goodhall, 3 Vern. 235.

The statute of limitations cannot, in most instances, be pleaded in bar of an account; (x) nor is it pleadable to a bill for an account of the arrears of an annuity or legacy, (y) or where money is lent or delivered in trust. (z)

Where there is a trust of real estate for payment of debts, it has been held to revive debts, which have been barred by the statute of limitations, and that they are entitled to be paid as well as other creditors; "though," says Lord *Hardwicke*, "I have often wondered how this rule at first prevailed, and judges have always grumbled at it, though it is now established in equity." (a)

*246 The statute of limitations may be pleaded to a bill brought to redeem, if the mortgagee has been in possession twenty years; (b) or it may be demurred to, where the objection appears on the face of the bill. (c)

So, a defendant may plead in bar to a bill for the discovery of tithes, by a lessee of the parson, the stat. 13 Eliz. c. 20. s. 1. against nonresidence. (d)

If a bill states facts amounting to the acknowledgment of a debt within the six years, a mere plea of the statute is insufficient; (e) and the charges in the bill of such acknowledgment must be answered; but whether by way of averment in the plea, as well as in the answer, has been doubted. (f) In several cases it has been held, that to take a case out of the statute there must not only be an admission of the debt, but an express promise to pay; (g) but the more modern cases seem to have overruled that doctrine. (h)

(x) Anon. 2 Freem. 22. see ante, p. 78, 9.

(y) *Higgins v. Crawford*, 2 Ves. jun. 572; *Parker v. Ash*, 1 Vern. 257. Anon. 2 Freem. 22. *Smallman v. Lord Hamilton*, 2 Atk. 71.

(z) *Warner v. Condit*, Easter, 6 G. H. 1733, MS.

(a) *Lacon v. Briggs*, 3 Atk. 107.; and see *Oughterkney* against Lord Powis, Amb. 231.; and see ante, p. 482.

(b) Mitf. Plead. 213. who cites 3 Atk. 225, 6. and the authorities there referred to.

(c) Mitf. Pl. 213.; and see ante, 1 vol. p. 416, 417.

(d) *Quilter and Mannes*, 6 G. H. Eq. Rep. 228.

(e) *Baillie v. Sibbald*, 15 Ves. 125.

(f) *Bayley v. Adams*, 6 Ves. 586. In Mitford's Pleadings, 213., it is said there must be an averment and an answer. See on this subject, Anon. 3 Atk. 70.

(g) See what is said in *Lacon v. Briggs*, 3 Atk. 107.

(h) *Yea v. Fouraker*, 2 Barn. 1009. Cowp. 548., and the recent cases there referred to.

The statute of limitations, though pleadable to the debt, is not as to the discovery, when the debt was due. (a)

Where the bill charges a fraud, and that the fraud was not discovered till within six years, before the filing of the bill, the statute is not a good plea, unless the defendant denies the fraud, or avers that the fraud, if any, was discovered within six years before the filing of the bill. (k) *247

If an executor, or administrator, or a trustee for an infant, neglect to sue within six years, the statute of limitations binds the infant. (l)

A corporation is entitled to the benefit of the statute of limitations, in the same manner as private persons. (m)

A plea of the statute of frauds, (n) in answer to a bill for the specific performance of an agreement, has before been advanced to. (o) This statute may also be pleaded to a bill for the discovery and execution of a trust, with an averment that there was no declaration of the trust in writing, (p) unless it be a secret trust, in fraud of an act of parliament. (q)

A plea of the statute 32 Hen. VIII. c. 9. against selling pretended or controverted titles, with an averment that the defendant "had not been in possession within a year before the lease or mortgage alleged by the bill to have been made," has been held a good. (r)

2. A decree signed and enrolled, (s) or order of the court, *248 may be pleaded, by which the rights of the parties have already been determined.

If a cause is not heard on the merits, and the circumstances discussed, but is dismissed on the hearing for want of the plaintiff's appearance, such decree, it seems, could not be pleaded; (t) for such dismissal is not, *res judicata*, an absolute de-

tioned in argument of *Baillie v. Sibbald*, 15 Ves. 185.

(a) *Mackworth v. Clifton*, 2 Atk. 51.
(k) *Mitt. Plead.* 212.

(l) *Wych v. East-India Company*, 3 P. Wms. 309.

(m) *Ib.*

(n) 29 Car. II. c. 3.

(o) *Auto*, 1 vol. 305.

(p) *Mitt. Plead.* 210.

(q) See ante, 1 vol. 240.

(r) *Cooper's Treatise of Pleading*, 259., and the case there cited of *Hitchins v. Lander*, in Chan. 23 July, 1807.

(s) That it must be enrolled, see *Anon.* 3 Atk. 809. *Kinsey v. Kinsey*, 2 Ves. 577.; but see *Prettyman v. Prettyman*, 1 Vern. 310.

(t) *Pickett v. Loggon*, 14 Ves. 222.

termination in the court that the plaintiff had no title.(z) Though a bill be dismissed on the merits, yet if by the plaintiff's gaining the legal estate the defendant is compelled to file an original bill as plaintiff, the decree of dismissal cannot be pleaded.(a)

If a bill seeks to set aside a decree for fraud, and the imputed circumstances of fraud are denied by the answer, the decree may be pleaded.(b)

A plea of a *ventenoe* in the ecclesiastical court, *ex directo*, is a matter properly cognizable there, appears to be conclusive, where the same matter comes in question collaterally in a court of equity.(c)

A plea of a former decree for the payment of tithes, where a *modus* and the lands alleged to be covered by it were imperfectly stated, so that the court could not direct an issue, was *249 held not to be a bar to a bill brought for establishing the *modus*.(d)

In support of a plea of a *former decree*, it is necessary to set forth so much of the first bill and answer as will show the same point was then in issue.(e)

A judgment in a court of ordinary jurisdiction, which has finally determined the rights of the parties, may, in general, be pleaded in bar of a suit in equity;(f) but a plea of a foreign sentence in a *commissary court* in France, relating to the same matters for which the bill was brought here, was overruled; for the court which gives sentence must have jurisdiction to determine the rights of the parties.(g)

If there is any charge of fraud, or other circumstances shown, as ground for relief, the judgment(h) or sentence cannot be pleaded, unless the fraud, or other circumstance in the judge

(z) *Brandlyn v. Ord*, 1 Atk. 571.; and see *Mitf. Plead.* 196: who cites 1 Vern. 310. 1 Bro. P. C. 281.

(a) *Sawyer v. Bletsoe*, 2 Vern. 329.

(b) *Bradish v. Gee*, Ambl. 229. ante, 1 vol. p. 237.; and see *Mitf. Plead.* 197, and the cases there cited.

(c) *Meadows against Duchess of Kingston*, Ambl. 756.

(d) *Collins v. Gough*, 7 Bro. P. C. 94. Toml. Edit.

(e) *Child v. Gibson*, 2 Atk. 603.

(f) *Mitf. Plead.* 204. and the case of *Sydney*, styling himself *Earl of Leicester*, against *Perry*, in Ch. 23d July, 1783, there stated. 8. C. 1 Bro. C. C. 313. 3 Atk. 223.

(g) *Gage v. Berkeley*, 3 Atk. 214.

(h) See, as to relief in cases of fraudulent verdicts and judgments, ante, vol. 1. 206.

being sought to be impeached, be denied, and thus put in issue by the plea, and the plea supported by a full answer to the charge in the bill.(i)

3. *A plea of a former suit depending for the same cause, unless it was brought in a different right, (k) is a good plea, and need not be on oath (l) but such plea is not set down, (m) and the plaintiff is bound to procure a reference to the master, and a report within a month after the plea is filed, otherwise, at the instance of the defendant, the bill will be dismissed. (n) No suit is considered as depending, till the defendants have appeared, or been served to appear. (o)* *250

The pendency of a suit at common law cannot be pleaded in bar of a suit in equity. (p)

A plea of a suit depending in the court of chancery of Ireland, for the same matter, is not a good plea. (q)

After a bill brought in the exchequer to foreclose, the defendants may bring a bill in chancery to redeem, and the pendency of the former suit not pleadable. (r)

It seems, that a like suit in the court of chancery in Jamaica, may be pleaded to a suit in this country, if it be set out with certainty, as to the year and term in which it was instituted. (s)

If a creditor comes in before a master under a decree, he is *quasi* a party to that suit; and if he brings a new bill, a plea of a former suit depending will hold. (t)

*A plea of a *fine* and *nonclaim*, with proper averments, may be pleaded in bar of a suit. (a) In such a plea, a direct positive averment of seizin is necessary, and it must not be alleged argumentatively, as "that the party being in possession and receipt of the rents, and thereby seized of the rents, &c." (b) The same strictness is required in pleading a *fine* in equity as at law. *251

(i) *Mitt. Plead.* 395.; and see 22 Ves. 305.

(k) *Haggins v. York Buildings Company*, 2 Atk. 44.

(l) *Urrin v. Hudson*, 1 Vern. 332.

(m) See *Urrin v. Hudson*, 1 Vern. 332. *Anon.* 1 Ves. jun. 494.; and see 3 Bro. C. C. 544.

(n) *Baker v. Bird*, 2 Ves. jun. 372.

(o) *Moor and Welch Copper Company*, 1 Eq. Abr. 39.

(p) 3 R. Wms. 300. cited *Mitford's Pleadings*, 409.

(q) *Lord Dillon v. Alvarez*, 4 Ves. 347.

(r) *Earl of Newbury v. Wren*, 1 Ves. 239.

(s) *Foster v. Wassa*, 3 Atk. 596.

(t) *Noye v. Weston*, 3 Atk. 557.

(a) *Mitt. Plead.* 201.

(b) *Dobson v. Leadbeater*, 15 Ves. 230. which overruled 3 Bro. C. C. 59.

A fine levied pending a suit in equity has not been allowed to prejudice the legal title.(c)

A plea of a *conveyance*, *fine*, and *nonclaim* to a bill, impeaching the conveyance, for want of a valuable consideration, is a good plea, and is not considered as multifarious.(d)

It is not necessary to enter into the general learning as to fines, or into the distinctions respecting fines good at law, but not binding in equity.(e) The doctrine as to fines founded in *fraud*, and fines levied by one who has notice of a trust,(f) has before been observed upon. It is sufficient here to observe, that a fine effective in law and equity may be pleaded.

*252 A recovery duly suffered with the deed to lead the uses, may be pleaded to a claim under an entail, destroyed by such recovery.(g)

The general doctrine as to legal and equitable recoveries,(h) is sometimes treated of under this head by writers on equity pleading, but not necessarily so, nor will it here be considered.

A plea of an *award*,(i) is not only good to the merits of the case, but to the discovery,(k) unless *fraud or concealment* be charged,(l) in which case the defendant should not only plead the award, but should also, by answer, deny the imputation of fraud.(m)

A plea to a bill of discovery, that, by articles, all disputes were agreed to be referred, is sufficient.(n)

and 1 Ves. 136. Page v. Lever, 2 Ves. jun. 450. Story v. Windsor, 2 Atk. 630.

(c) In some cases, such strictness does not seem to have been thought necessary. See Butler and Every, 1 Ves. jun. 136. and S. C. 3. 4 Bro. 80. and the observation in note (a.) to 13 Ves. 234.

(e) Hopkins v. Bond, 1 Sch. and Lefr. 432. Pinke v. Thornycroft, 4 Bro. P. C. 82. 2 edit.

(d) Doble against Cridland, 2 Bro. C. C. 274.

(e) See ante, 1 vol. 211, 212. as to fines.

(f) Ante, 1 vol. p. 211, 212. and 2 vol. post.

(g) Mitt. Plead. 208. who cites Sal-keld v. Sal-keld, 1763. before Lord

Northington, Brown against Williamson, Trin. 1722.

(h) As to equitable recoveries, see ante, 1 vol. p. 361.

(i) See ante, 1 vol. 66. on this subject.

(k) Tittenson v. Peat, 3 Atk. 529.; and see Lingood v. Eade, 2 Atk. 501.

(l) South Sea Company v. Bumstead, 2 Eq. Ca. Abr. 80.

(m) See 6 Ves. 599. and Gartside v. Gartside, 3 Anstr. 736.; but see Pope and Bish, 1 Anstr. 59. and Edmundson v. Hartley, lb. p. 97. See Champion against Wenham, Amb. 245. on this subject.

(n) Mitchell v. Harris, 2 Ves. jun. 129. S. C. 4 Bro. C. C. 311. Hill v.

A *release*, a *compromise*,^(o) or a *stated account*, may be pleaded in bar; but if a bill be filed to set aside an agreement and a release, charging imposition and duress, it is not sufficient to plead the **agreement and release*, but the defendant must also, **253* by answer, deny the fraud or duress.^(p)

In a plea of a release, the defendant must set out the consideration upon which the release was made.^(q) A plea of a release, or a stated account, to a bill for an account, has before^(r) been observed upon.

A plea of *want of parties* may be pleaded in bar to a bill, and goes to the whole bill, to the discovery and relief.^(s) We have already fully treated of the necessary parties to bills. If the want of parties appear on the face of the bill, it is *demurrable*; if not, it is the proper subject of a plea. But it is observable, that neither a demurrer nor plea will lie for want of parties to a bill merely of discovery.^(t)

Upon arguing a plea of this kind, the court, instead of allowing it, has given the plaintiff leave to amend the bill upon payment of costs.^(u)

Pleas in bar of a discovery are, 1. That the discovery may subject the defendant to a penalty, or will be a breach of confidence; 2. That defendant is a purchaser for a valuable consideration; 3. That defendant has no interest in the subject of the suit.

1. The doctrine as to discovering what may **subject the* **254* party to a penalty, has before been considered,^(v) nor is it necessary to enlarge much further on the subject. Disclosures which would be a breach of confidence, have also been adverted to.^(w)

A defendant has a right to insist that he is not to be compelled to answer not only the broad and leading fact, but any fact, the

Hollister, 1 Wils. 129. Street v. Rigby, 6 Ves. 815.; and see Waters v. Taylor, 15 Ves. p. 14., and also Willington v. Mackintosh, 2 Atk. 569. These cases overrule Halphide against Fenning, 2 Bro. C. C. 336. S. C. 2 Dick. 702.

^(o) Leonard v. Leonard, 1 Ball and Beatty, 329.

^(p) Freeland v. Johnson, 1 Anstr. 776.; and see 6 Ves. 596.

^(q) Mitf. Plead. 209.

^(r) Ante, 1 vol. p. 80. As to accounts between mortgagor and mortgagor, see ante, 1 vol. 423.

^(s) Plunket v. Penson, 2 Atk. 51.

^(t) Mitf. 163. 221.

^(u) Ib. 221.

^(v) Ante, 1 vol. 173.

^(w) Ante, 1 vol. 174.

answer to which may furnish a step in a prosecution, if any person should choose to indict him.

If a bill states the marriage of the defendant with a particular woman, he may plead that she is his sister; and may refuse to state any thing more, or speak as to any one fact forming a link in the chain.(x) So, where there had been a transfer of stock, under an agreement to satisfy the deficiency in the accounts of a banker's clerk, this was considered as amounting to the offence of a composition of felony, to prevent a prosecution; and that the defendant might, by plea, protect himself from a discovery.(y)

But the allegation by a defendant, that an answer may subject him to a supposed crime, does not prevent relief in equity: and, therefore, in a case of *usury* or *forgery*, if proof can be made of it, the court will let the cause proceed to a hearing, and direct an issue, though it will not oblige the party to give a discovery.(z)

*255 *A plea of purchaser for a valuable consideration, is good as a plea in bar, and protects the defendant from giving an answer to a title set up by the plaintiff;(a) but a plea of a bare title only, without setting forth any consideration, will not.(b) This plea is put in upon oath.(c)

A defendant pleading a *purchase for a valuable consideration*, without notice, must, if the conveyance purports an immediate transfer of the possession,(d) aver that the vendor was seized in fee, or pretended to be seized,(e) and was in possession;(f) which is satisfied by the possession of his tenant.(g) And the purchase money must be actually paid, (not merely secured to be paid,)(h) for, otherwise, the purchaser would not be hurt.

(x) *Claridge and Hoare*, 14 Ves. p. 65. *Brownword and Edwards*, 2 Ves. 243.

(y) 14 Ves. p. 59.

(z) *Brownword and Edwards*, 2 Ves. 246.

(d) See *Ante*, 1 vol. p. 159, 170. *Hart v. Middlehurst*, 3 Atk. 577. *Fitzgerald v. Fauconbridge*, Fitzg. 307.

(e) *Brereton v. Gamel*, 3 Atk. 241.

(f) *Marshall v. Frank*, Free. Ch. 18.

(g) 3 P. Wms. 281.

(h) *Mitt. Plead.* 215. 2 Atk. 630.; and see *Head v. Egerton*, 3 P. Wms. 281. *Attorney General v. Bathhouse*, MS.

(f) *Wallwyn v. Lee*, 9 Ves. 32. *Trevanion and Mose*, 1 Vern. 246.

(g) *Daniels v. Davison*, 16 Ves. 352.

(h) 3 Atk. 304.; and see 3 P. Wms. 307. and *Harrison v. Southcote*, 1 Atk. 538. *Story v. Lord Windsor*, 2 Atk. 638.

If a tenant in tail, in possession under a marriage settlement, files a bill for a discovery, and the delivery of title deeds, the defendant may plead a mortgage by the tenant for life, alleging himself to be seized in fee, and in possession of the premises and deeds as apparent owner.

A purchaser denying notice need only set forth the purchase deed, and plead his purchase in bar to the discovery of the title deeds.(i)

*If a bill states facts, from which notice of the plaintiff's claim is inferred, it is not sufficient merely to plead a purchase without notice actual or constructive, and the defendant must also by answer deny the facts from which notice is inferred ;(k) but he is not compellable to make a farther answer, as to all the circumstances of the case, that are to blot and rip up his title.(m) *256

And the defendant must swear that he had no notice at or before the execution of the deed,(n) though notice is not charged in the bill.(o) And, it seems, denying notice, without adding "at any time, before, &c." is sufficient.(p) It seems best to deny notice both by plea and answer.(q)

A subpoena served, and a bill filed, (but not a subpoena alone,) is considered as *lis pendens* against all persons.(r) A decree is not implied notice to a purchaser after the cause is ended ;(s) for it is the pendency of the suit that creates notice : but where it is only a decree to account, and not such a one as puts a conclusion to the matters in question, that is still such a suit as affects people with notice of what is doing.

Where a purchaser cannot make out his title, *but through a deed which leads to a fact, he will be affected with notice of that fact.(t) *257

(i) Ashton v. Ashton, 3 Atk. 302.

(k) Radford v. Wilson, 3 Atk. 815.

Jarrard v. Saunders, 2 Ves. jun. 187.

S. C. 4 Bro. C. C. 322.

(m) 4 Bro. C. C. 458. Kelal v.

Bennet, 1 Atk. 522. ; and see tit. Answer.

(n) Fitzgerald v. Burke, 2 Atk. 397.

(o) Jones and Thomas, 3 P. Wms.

243.

(p) Ib.

(q) Note F. to 3 P. Wms. 244. Mitf. Plead. 216.

(r) Anon. 1 Vern. 318.

(s) Sed vid. 1 Vern. 459.

(t) Mertins v. Jolliffe and others, Ambl. 312. Moor v. Bennett, 2 Ch. Cases, 246.

Notice to the *agent* is notice to the *principal*; (u) but notice will not be presumed merely from the circumstance of title deeds laid before a counsel or attorney, or any thing that could not be supposed to make an impression on the memory. (v)

Registration in Middlesex, of an *equitable* mortgage, is not presumptive notice of itself to a subsequent *legal* mortgagee, without *actual* notice. (w)

A purchaser with notice, from one who purchased without notice, may plead his purchase; (x) but where a purchaser with notice aliened to one who had no notice, though the court would not affect the purchaser without notice, yet, it being a fraud, the vendor (the purchaser with notice) was decreed to make satisfaction to the plaintiff. (y)

*258 A plea of a purchase for a valuable consideration *is not good to a bill for *dower*. (a) How far an assignment of a term will secure such a purchaser, has before been considered. (b) If a widow is defendant to a suit by a person claiming under her husband, to discover her title to lands of which she is in possession, as her jointure, she may plead her settlement in bar to any discovery, unless the plaintiff offers, and is able to confirm her jointure; but a plea of this nature must set forth the settle-

(u) Sheldon against Cox, Amb. 626. Maddox v. Maddox, 1 Ves. 62.

(v) Ashley v. Baillie, 2 Ves. 370.

(w) Morecock against Dickins, Amb. 678. Cheval and Nicholls, Str. 664. See on this subject Busbell v. Busbell, 1 Sch. and Lefr. 92. 103. ; and see 137. 157.

(x) Lowther v. Carleton, For. 187.

(y) Ib. 188, 9. Mertins v. Jolliffe, Amb. 312. This proposition has been questioned; and it has been urged, that a vendor with notice could not pass any different interest in the estate, than what he himself possessed, and passes subject to the equities affecting it; and so, according to my notes, Lord Eldon intimated, in Mackreth v. Symonds, MS. and upon other occasions; and see Grounds and Rudiments of Law and Equity, 275. There are, however, ca-

ses, in which the doctrine in Ambler is countenanced; see Harrison v. Forth, Prec. Ch. 51. Brandlyn v. Ord, 1 Atk. 571. Ferrars v. Cherry, 2 Vern. 384. Lowther v. Carleton, Barn. 358. S. C. For. 187. 2 Atk. 139. 242. Mitf. Plead. 218, Sweet v. Southcote, 2 Bro. C. C. 66. 1 Sch. and Lefr. 379.

If a person purchases of a trustee without notice, he clearly holds discharged of the trust, (see ante, p. 104.) which would not be the case, if the vendor's notice of a trust affected a purchaser without notice. The authorities are so numerous and concurrent on this subject, that, I fear, I must have misunderstood Lord Eldon.

(z) See ante, p. 104.

(a) Williams against Lambe, 3 Bro. C. C. 264.

(b) Ante, 1 vol. p. 406. etc.

ment, and the lands comprised in it, with sufficient certainty.(c)

A man cannot defend himself as a purchaser for a valuable consideration under *articles* only; there must be a conveyance to support such plea; if he is injured, he must, in such case, sue at law upon the articles.(d)

Notice of a bargain and sale not enrolled;(e) of a deed not registered;(f) or of a judgment not docketed,(g) will affect a purchaser.(h)

*It has often been decided, that a person, taking a security, *259 or an estate, in consideration of a debt previously existing, is equally a purchaser for a valuable consideration, as upon an advance of money at the same time. The only distinction is, that in the one case, the advance being made, and the conveyance executed at different periods, notice must be denied as to both.(i)

A purchase for a valuable consideration *bona fide* paid, has been held a good defence, though the consideration was much less than the real value.(k)

A claimant under a *marriage settlement*, without notice of prior encumbrances, will not be compelled to a discovery.(l)

If a settlement is made after marriage, in pursuance of an agreement before marriage, the agreement and the settlement must be shown.(m)

Answer.

If no demurrer, or plea, or disclaimer, is put in, an answer must be given; and whatever part of the bill is not covered by the demurrer, plea, or disclaimer, must be answered, unless the defendant disclaims,(a) i. e. denies, on oath, he hath or *claims *260 any right or title to the thing demanded by the plaintiff's bill.

(c) Mitf. Plead. 219.

(s) See Arg°. ex parte Knott, 11 Ves.

(d) *Brandlyn v. Ord*, 1 Atk. 572; 616.

and see *Hart v. Middlehurst*, 3 Atk.

(k) *Bullock against Sadliers*, Amb.

377. and *Fitzgerald v. Fauconbridge*,

764.

Fitzg. 9. 207. *Echiffe v. Baldwin*, 16 Ves. 267.

(j) *Williams v. Lane, Bro.* Parl. Cas. 8 vol. p. 291. Tomlin's edit. Finch, 9.

(e) 3 Atk. 651, 2.

(m) Mitf. Plead. 218, 219., who cites 1 Vern. 139.

(f) See ante, 1 vol. p. 260.

(g) *Davis v. Strathmore*; 16 Ves. 419.

(a) Mitf. Plead. 244.

(h) *Sanders on Uses*, 1 vol. p. 255.

A defendant may demur to one part of a bill, plead to another part, disclaim as to another, and answer as to another. (b) The answer must be signed by a counsel, unless it be taken before commissioners. The time which a defendant is allowed, to answer, has before been stated. (c)

The answer, whether taken before the master or commissioners, must be signed by the parties, and sworn to in the presence of the master, or the commissioners, before whom the same is taken; (d) unless the plaintiff consents, the answer should be taken without oath; (e) but, under special circumstances, and by consent, the six clerk has been directed to receive the answer to a bill of foreclosure, though not signed by the defendant. (f)

If an answer be prepared for five persons, and only three appear at the office to swear it, it may be refused. (g)

If the answer misnames the plaintiff, it is not considered as an answer, and will be ordered to be taken off the file. (h)

*261. *A Jew puts in his answer upon honour; but his answer to interrogatories, and on examination as a witness, must be upon oath. (i) A Quaker has been allowed to put in his answer without oath, or affirmation, where the bill appeared to be frivolous. (k) A Jew puts in his answer on the *pentateuch*. (l)

A foreigner may put in an answer in his own language, but a sworn translation must also be filed with it. (m) A corporation puts in an answer without oath, under the corporation seal.

An infant puts in his answer by his guardian, but it is not evidence against him; (n) and before he comes of age, he may apply to put in a better answer, where he might not be able to come at the same evidence when he is of age. (o)

A lunatic, against whom a commission *de lunatico inquirendo*

(b) Mitf. Plead. 254.

(c) Ante, p. 208. etc.

(d) Vid. Ord. Curiae, 27th April, 1742. See this again, 2 Atk. 40. Vid. 3 Atk. 439., a case anterior to the order, though subsequently reported.

(e) See ante.

(f) *— v. Luke*, 6 Ves. 371. On this subject, see ante.

(g) *Harris against James*, 3 Bro. C. C. 399.

(h) 11 Ves. 62, 3.

(i) *Sir Thomas Meers v. Lord Sturton*, 1 P. Wms. 146.

(k) *Wood v. Story*, 1 P. Wms. 389.

(l) *Anon.* 1 Vern. 263.

(m) *Symonds against the Countess de Barre*, 3 Bro. C. C. 263.

(n) *Wrottesley v. Rendish*, 3 P. Wms. 337. *Savage v. Carroll*, 1 Ball and Beatty, 553.

(o) *Bonnet v. Lee*, 2 Atk. 483. 532.

has issued, puts in his answer by his committee, unless he is interested in the suit, in which case he must answer by guardian, as he must, also, where no commission of lunacy has issued. (p)

Any person who, from age, infirmity, idiocy, or the effects of sickness, or by any other means, is rendered incapable of managing his own affairs, may have a guardian assigned to him for the purpose of putting in his answer. (q) *262

If a bill be filed against baron and feme, the feme must answer, though her answer will not be evidence against her husband or herself, unless, perhaps, where she afterwards become discover. (r)

An answer usually begins by a reservation to the defendant of all advantage which may be taken by exception to the bill; a *traverse*, which was intended to prevent a conclusion that the defendant, having submitted to answer the bill, admitted every thing which by his answer he did not expressly controvert, and especially such matters as he might have objected to by demurrer or plea. The answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf, next follow, with a general denial of that combination which is usually charged in a bill. (s)

The *general traverse*, at the end of an answer, viz. "without that, that any other matter in the bill contained is true," obtained formerly, when the defendant used only to set forth his case in the answer, without answering every clause in the bill; and where the bill is fully answered, the general traverse is rather impertinent than otherwise, (t) though in practice usually introduced. *263

In the case of an infant, the answer is expressed to be made by his guardian; and the general saving at the beginning, together with the denial of combination, and the traverse at the conclusion, are omitted; for an infant is entitled to the benefit

and *Baraga v. Carroll*, 1 Ballant Bantty, 548. et vid. *Richmond v. Taylor*, 1 Flawm. 735.

(p) Turn. and Ven. Pract. 1 vol. 197.

(q) Turn. and Ven. Pract. 1 vol. 197.

(r) *Wootenley v. Boodish*, 3 P. Wms. 238.

(s) *MIL. Plad.* 249.

(t) *Anon.* 2 P. Wms. 87; and see *MIL. Plad.* 249.

of every exception which can be taken to a bill, without expressly making it.(u)

(v) The attorney general may in his discretion put in an answer, or refuse to answer, nor can process of contempt go against him.(v) The usual answer of an attorney general is, "that he is a stranger to the matters and things contained in the bill, and leaves the plaintiff to make out the best case he can." If, however, the attorney general refuses to answer, the plaintiff may move that the court may appoint a short day for the attorney general to answer the bill, or in default thereof that it should be taken *pro confesso*.(w) Where the attorney general puts in the common answer, he may afterwards move to withdraw it, and put in a new answer.(x) and this, *ex gratia*, is frequently done to give the plaintiff a clue to what will be the case of the attorney general; but no exceptions, it has been held, can be taken to such answer, or to any answer of the attorney general.(y)

*264. A defendant may, as before observed, *disclaim* all right or title to the matter in demand by the plaintiff's bill, or by any part of it. But a disclaimer can scarcely be put in alone; for if the defendant has been made a party by mistake, having never had an interest in the matter in question, yet, as he might have had an interest which he may have parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not; and if in truth it is so, an answer seems necessary, to enable the plaintiff to make the proper party, instead of the defendant disclaiming.(z) So, if fraud be charged, a disclaimer alone is insufficient; and an answer must be given to the imputed fraud.(a)

Where the defendant disclaims, the court will, in general, dismiss the bill against him, unless his conduct has been vexatious;(b) but it is said,(c) if the plaintiff shows a probable cause

(u) Mitt. Plead. 256.

(v) Barclay v. Russell, Dick. 730.

Davison v. Attorney General, Exch. 1813.

(w) See the cases mentioned by Mr. Fowler in his Exchequer Pract. p. 452; and see Barclay v. Russell, 12 Ves. 729. S. C. Dick. 730.

(x) Errington v. Attorney General, Bunb. 303.

(y) Davison v. Attorney General, Exch. 30 June, 1813.

(z) Mitt. Plead. 263.

(a) 1 Anstr. 47.

(b) Cooper's Eq. Plead. 311, and the case there mentioned.

(c) Harrison's Ch. Pract. Newland's Ed. p. 235.

for exhibiting the bill, he may, by motion or petition, pray a decree against the defendant, upon the ground of the disclaimer. (a) Where the defendant disclaims, unless the disclaimer be only as to part, and an answer to the rest of the bill, the plaintiff should not reply: (b) if he does, he pays the costs. The defendant cannot get rid of his disclaimer, without a strong case, upon affidavit, showing ignorance or mistake. (c)

If a party has a right to relief, he has a right to *an answer *265 from the defendant to every allegation of his bill, the admission of the truth of which, or the proof of the truth of which, is necessary to entitle him to that relief. (d)

In a suit for an account, the answer must not merely be such as to enable the plaintiff to obtain an account in the master's office; but the defendant is bound to give the best account he can by the answer; not by long and oppressive schedules, but by referring to books and accounts so sufficiently, as to make them part of the answer. The plaintiff has a right to compel him by his answer to say, that is the best account he can give. (e)

But if, in a suit against an executor or administrator, he denies by his answer the foundation of the bill, viz. That the plaintiff is not the next of kin, in which right he sues; (f) or denies that there is a balance of accounts against the testator's estate; he need not set forth an account of the personal estate by way of schedule. (g) But if the fact does not lie in his knowledge, though he denies it, yet he must set out an account of assets. (h)

So, where a bill for an account was filed, of goods landed at a certain quay, the plaintiff claiming a *right of tollage by prescription, the defendant denied the plaintiff's title, and refused to discover the goods; and it was held he was not compellable, till the plaintiff had established his right at law. (i) *266

If a bill be brought for tithes of conies by custom, and the

(a) *Mitt. Plead.* 254.

(b) *Harrison's Ch. Pract. Newl. Edit.* 354.

225: 3 *Atk.* 582. *Mitt. Plead.* 235.

(c) 7 *Ves.* 207.

(d) *Goeth v. Jackson*, 6 *Ves.* 37, 8.

(e) *White v. Williams*, 2 *Ves.* 182.

Leonard v. Leonard, 1 *Ball and Beatty*, 324.

(f) *Street against Young*, *Ambl.*

(g) *Phillips v. Gentry*, 4 *Ves.* 107. and

vid. Mitt. Plead. 248.

(h) *Ambl.* 284.; and see *Hard.* 182.

(i) *Northleigh v. Lacombe*, *Ambl.*

defendant, by answer, denies the custom, he need not set forth how many conies he killed. (k)

It is broadly laid down in some books, that, if a defendant answers at all, he must answer fully; but this has been a subject of much controversy. (l) Lord Eldon termed it "a distracted point." (m) Lord Kenyon (n) and Lord Thurlow (o) differed on the subject; (p) but Lord Rosslyn observed, that *Cookson v. Ellison* is mistaken, though *Shepherd v. Roberts* was truly reported. Lord Thurlow afterwards changed his opinion. (q)

*267 In one case, Lord Commissioner Eyre said, it had been constantly the practice in the court of exchequer, upon arguing exceptions, to admit the question to be argued, how far the party was bound to answer the interrogatories put to him; but he should be glad to take advantage of the rule that Lord Thurlow had laid down in particular cases, and to apply it to all, that wherever the party is not obliged to answer the interrogatories put, he must take advantage of it by demurrer. (r) If a person is made a defendant, who has no interest in the subject, and might have been examined as a witness, he may, as we have seen, by plea (except in the case of corporations) (s) or demurrer, (t) as the case may require, insist, that he is not obliged to answer; but if he does answer, he must, it seems, answer fully; (u) but where a defendant by answering may subject himself to a pain, penalty, or forfeiture; (v) in such case, though he might by a plea or demurrer shelter himself from answering, yet, if he does answer in part, he is not, as in the instances before alluded to, compellable to answer fully. (w) So, in a case in the exchequer, where

(k) *Randall v. Head*, Hard. 188.

(l) See *Dolder v. Lord Huntingfield*, 11 Ves. 293.

(m) *Shaw v. Ching*, 11 Ves. 303.

(n) *Jerrard v. Saunders*, 2 Ves. jun. 254.

(o) *Cookson v. Ellison*, 2 Bro. C. C. 232. *Shepherd v. Roberts*, 3 Bro. C. C. 239.

(p) *Baker v. Mellish*, 11 Ves. 75.

(q) *Jerrard v. Saunders*, 4 Bro. C. C. 457.; but see *Taylor v. Milner*, 11 Ves. 42.

(r) *Selby against Selby*, 4 Bro. C. C. 12.

(s) 3 P. Wms. 310. 3 Bro. 238. 1 Ves. jun. 292.

(t) *Cookson v. Ellison*, 2 Bro. C. C. 252.

(u) See before-mentioned cases; but see *Newman against Godfrey*, 2 Bro. C. C. 332. and 1 Anstr. 47.

(v) See *Paxton's Case*, Select Cases, &c. p. 63. *Honeywood v. Selwyn*, 2 Atk. 276. *no such case is cited*.

(w) See *Mitford's Pleadings*, p. 245. and the cases there cited. See also *Williams against Farrington*, 3 Bro. 40. and *Wrottesley v. Bendish*, 3 P. Wms. 238. and what Lord Eldon says in *Tay-*

a defendant was a *purchaser for a valuable consideration*, but did not plead that circumstance, as he might have done, but insisted upon it in his answer; Mr. Baron Parrot held, that he should not be obliged to *produce his title deeds*.(x) So, if a defendant does *not plead* the statute of limitations, yet that statute, it seems, may be insisted upon in the *answer*, and the same advantage derived as if it were pleaded.(y) A solicitor, also, may, by his answer to a bill against him and his clients, refuse to discover any deeds or facts confidentially communicated to him.(z) If a plaintiff state himself to be *heir*, and prays a discovery, it has been sometimes thought that the defendant by answer denying that the plaintiff is heir, need not make any further discovery; and sometimes it has been considered otherwise, as the defendant may die, and the discovery be lost;(a) nor does this point appear to be clearly settled. The rule, after all the fluctuation of opinion, appears now to be, that a defendant cannot by answer avail himself of every ground of defence, which he could use by demurrer or plea; but that if a discovery sought for by a bill be improper, a *demurrer* or *plea*, or what is known by the name of a *negative plea*, may be put in, or a short answer, showing that no further answer ought to be made; but a defendant is not allowed by an answer to give a *partial* discovery, more especially, if the defendant does not make *a sufficient* averment, as a ground of refusing a further answer.(b)

Although the defendant, by his answer, denies the title of the plaintiff, yet in many cases he must make a discovery, though not material to the plaintiff's title; and though the plaintiff, if he has no title, can have no benefit from the discovery. As if a bill is filed for tithes, praying a discovery of the quantity of land in the defendant's possession, and of the value of the tithes; though the defendant insists upon a *modus*, or upon an exemption from tithes, or absolutely denies the plaintiff's title,

for *v. Milner*, 10 Ves. 450. and Lord Manners, in *Leonard v. Leonard*, 325, 6.

(x) Quoted Arg. in *Hall and Noyes*, 3 Bro. 478.; and see *Leonard v. Leonard*, 1 Ball and Beatty, 326.

(y) *Norton v. Turville*, 2 P. Wms. 144.

(z) *Stratford v. Hogan*, 2 Ball and Beatty, 164.

(a) *Baker v. Mellish*, 11 Ves. 75, 6. That defendant may by answer insist that he is not heir, see the cases mentioned, ante, 1 Vol. p. 164.

(b) See *Somerville v. Mackay*, 16 Ves. 392.

he must yet answer as to the quantity of land and value of the tithes.(c)

It was held, that if a partnership be alleged, and an account prayed, and the defendant denies the partnership, he is not bound to set forth an account;(e) but this doctrine appears to be overruled by subsequent decisions.(f)

A defendant is bound to answer specifically to the specific charges in the bill; and, therefore, where a defendant was charged by the bill with the receipt of particular specified sums, with many circumstances respecting the times when received,
*270 and of whom, and on what account; it was held that it was not sufficient for the defendant to say generally, that he had, in a schedule, set forth an account of all sums received by him.(g)

The answer, also, must not be argumentative, but there must be a positive averment.(h)

If the answer be put in short and delusive, and merely to save an attachment, and not as a substantial answer, the court will not consider it as an answer, but order it to be taken off the file; and the court will at once decide upon such an answer; or, if necessary, it will refer it to the master, to see whether the answer put in be substantially an answer.(i)

A demurrer, together with a mere denial of combination by answer, does not satisfy the undertaking not to demur alone.(k)

Where a discovery is sought of a correspondence, if the defendants set forth extracts of letters, and swear that those are the only parts of the correspondence upon the subject, it is sufficient.(l)

A defendant will be held to an offer in his answer, though
*271 the circumstances of the case were varied from what they were at the time the answer was put in.(m)

The doctrine as to the production of letters or deeds, referred

(c) Miff. Plead. 248.; and see Gumbley v. Fontleroy, Bunb. 60.; sed vid. Jones v. Pawlet, Gwillim's Tithe Cases, 1100.

(e) See Jacobs v. Goodman, in note to Hall and Noyes, 3 Bro. C. C. 487.

(f) Row v. Teed, 15 Ves. 375.; and see Leonard v. Leonard, 1 Ball and Beatty, 323.

(g) Hepburn v. Darand, 1 Bro. C. C. 603.

(h) Faulder v. Stuart, 11 Ves. 303.

(i) Smith v. Sprig, 14 Ves. 415. overruling Tomkin and Lethbridge, 9 Ves. 178, and 463.

(k) Lee against Pascoe, 1 Bro. C. C. 78. Lamsdown v. Elderton, 8 Ves. 528.

(l) Campbell v. Franch, Anstr. 54.

(m) Holford v. Barnell, 1 Vern. 448.

to is an answer, which must be moved for, will be stated when we treat of motions after answer.

If an answer is insufficient, exceptions may be taken.

When the defendant has put in his answer, the plaintiff must determine, at his own risk, on what points he shall take exceptions: and if exceptions are filed, it is then for the defendant to consider, whether he has sufficiently answered as to all or any, and which of those points of the answer that are excepted to, and may submit to answer all, or some, or may argue the question, upon the sufficiency of the answer, first before the master, and afterwards, on exceptions to his report, before the chancellor.⁽ⁿ⁾

If an answer be filed in term, the plaintiff must put in his exceptions the same term, or within eight days after; but if the answer be filed in the vacation, the defendant has eight days after the commencement of the ensuing term to put in exceptions; and by the consent of the defendant, or by motion or petition, he is, as of course, entitled to two terms, and the vacation before the third, within which he may file exceptions, *namque* *pro tempore*;^(o) and after that, may have "further time upon special *272 cause;"^(p) except where the bill is a mere *bill of discovery*, in which case, it seems, the plaintiff is only entitled to the first eight days of the term, within which to file his exceptions.^(q)

The defendant has eight days from the delivery of the exceptions, to consider whether he will put in a further answer.^(r)

In the *exchequer*, if the defendant submits to answer exceptions, he must give notice to the other party, before he can file his amended answer; but the practice is different in the court of chancery.^(s)

In general, if a plaintiff amends his bill after an answer is put in, he cannot except to such answer; but if the amendment be merely that of adding a defendant, this does not preclude the plaintiff from excepting to the answer.^(t)

So, the amendment of a bill after an answer, by introducing

(n) 11 Ves. 577. and 100.

(o) Thomas v. Llewellyn, 6 Ves. 333. Vid. 3 Atk. 19.

(p) Anon. 3 Atk. 19. Goodinge v. Woodhams, 14 Ves. 536.

(q) Hewart v. Semple, 5 Ves. 86.

(r) Harrison's Ch. Prac. Newl. Edit. p. 197.

(s) Anon. 1 Anstr. 86.

(t) Taylor v. Wrench, 9 Ves. 315.

a prayer for an injunction, has been permitted, without prejudice to exceptions.(u)

Exceptions must be signed by counsel.

No exceptions lie to the answer of the *attorney general*,(v) or of an *infant*.(w)

*273 *Whilst a demurrer(x) or a plea(y) is depending, no exceptions can be taken to an answer.(x)

If exceptions are taken pending a demurrer to discovery, this operates as an admission of the demurrer; but the court will permit the party to withdraw his exceptions on the payment of costs.(a)

Where there is an answer to part, and a plea to the residue, the plaintiff cannot except to the answer till the plea is argued, or an order obtained that it shall stand for an answer, with liberty to except.(b)

If exceptions are taken to an insufficient answer, and the defendant insufficiently answers the exceptions, the answer must then be referred back upon the old exceptions,(c) for the plaintiff cannot add to the exceptions.(d)

Where an original bill has been filed, and exceptions have been taken to the answer, and the plaintiff moves to amend, if he excepts upon the answer to the original and amended bill, as insufficient, he must go before the master upon the old exceptions as they apply to the original bill; and upon new exceptions, as to the new matter introduced by the amendments; and the utmost he can have, is the master's judgment upon the answer to the amendments with reference to *such part of the original bill as apply to them. If the original words apply to the amendments, the master, considering whether the answer is sufficient as to the amendments, must take into his considera-

(u) *Savory v. Dyer*, Ambl. 70. Jacob v. Hall, 12 Ves. 468.

(v) *Baker v. Attorney General*, Exch. 1814.

(w) See 1 Ves. jun. 484. 4 Bro. C. C. 256. *Lucas v. Lucas*, 13 Ves. 274. S. C. MS.

(x) *London Assurance v. East-India Company*, 3 P. Wms. 326.

(y) *Copeland against Wheeler*, 4 Bro. C. C. 256.

(a) *Baker v. Pritchard*, 2 Atk. 390.

(b) *Boyd v. Mills*, 13 Ves. 85. Miff. Plead. p. 232.

(c) *Darnel against Reyny*, 1 Vern. 344.

(d) *Partridge v. Haycraft*, 11 Ves. 575.

(e) *Ib.* 577. 580.

tion every thing in the amended bill, that gives a construction to the amendments. (e)

If an answer is put in, and upon exceptions it is reported insufficient, the defendant, it has been held, may still insist on the same matter by his second answer; (f) and if, on exceptions to such second answer, it is again reported insufficient, the defendant may except to such report, and bring the matter before the court: for where there are several exceptions, as the matter has not undergone the judgment of the court, they may go into it; but, says Lord Hardwicke, "If it was a single exception, perhaps, it would be another matter." (g)

This position, it seems, is not now tenable; for, formerly, it was usual when one exception to an answer was allowed by the master, he reported the answer insufficient generally, without entering into the consideration of the remaining exceptions; but it is now determined, that the master's judgment must be given on each exception. (h)

When exceptions were taken to an answer, and the answer was reported insufficient, and the plaintiff amended his bill, and took a great many exceptions to the answer to the amended bill, the chancellor, on motion, referred the second set of ex- *275 ceptions to the same master. (i)

Replications and Rejoinders.

A replication is the plaintiff's answer or reply to the defendant's plea or answer. (a)

Where the defendant by his answer admits the plaintiff's case, or sufficiently so as to render the examination of witnesses unnecessary, a replication need not be filed; (b) unless in the case of an infant, who, as his answer cannot be read against him, can admit nothing, and the plaintiff, therefore, must prove his case. (c)

(e) *Ib.* 581.

(f) *Finch v. Finch*, 2 Ves. 491.

(g) *Ib.*

(h) *Rowe v. Gudgeon*, 1 Ves. and Bea. 333.

(i) *Pratt v. Tassie*, 1 Bro. C. C. 39.

(a) *Mitt. Plead.* 255.

(b) *Pract. Reg.* Wyatt's Edit. p.

374. *Barker v. Wyld*, 1 Vern. 140.

(c) *Legard v. Sheffield*, 2 Atk. 377.

contra, *Thurston v. Dechair*, mentioned in note A. to 3 P. Wms. 389; and see on this subject, *Essays on Tracts*, 291.

Special replications were formerly put in, but they are now disused.(d)

If the plaintiff conceives, from any matter offered by the defendant's plea or answer, that his bill is not properly adapted to his case, he may, on motion, obtain leave to amend his bill, and suit it to his case as he shall be advised.(e)

Rejoinders are now, generally, disused, but the plaintiff, after replication, must serve the defendant with a subpoena, requiring him to appear to rejoin; unless he will appear *gratia*. The effect of this process is merely to put the cause completely at issue between the parties; for immediately *after the defendant has appeared to rejoin *gratia*; or after the return of a subpoena to rejoin, served on the defendant, and which by order, obtained of course, is now usually made returnable immediately, and served on the defendant's clerk in court, the parties may proceed to the examination of witnesses to support the facts alleged by the pleadings. Where, by mistake, a replication has not been filed, and yet witnesses have been examined, the court has permitted the replication to be filed *nunc pro tunc*.(f)

Where there is a plea and answer, and the plaintiff replies, the replication must be to the answer and also to the plea.(g)

A plaintiff may, after replication, obtain an order of course to withdraw his replication, and amend the bill;(h) but the court will not give leave to *withdraw a replication*, unless it is added, that the plaintiff may thereby be enabled to *amend his bill*;(i) and, in such case, the plaintiff must not only show the materiality of the amendment, but, also, why the matter to be introduced by the amendment was not stated before.(k)

Sometimes liberty to amend is given, without withdrawing the replication.(l)

*277 An order to withdraw a rejoinder and rejoin *de novo*, may be obtained for the purpose of giving notice of an intention to dispute an act of bankruptcy, under the stat. 49 Geo. III. c. 121. by analogy to the practice at law, permitting a plea to be

(d) *Nesworthy v. Barnett*, 1 Vern. 351. *Miff. Treat.* 256.

(e) See *Miff. Flood*, 266.; and see post, 266. etc.

(f) *Miff. Flood*, 267.

(g) *Niccol v. Wiseman*, 2 Vern. 46.

(h) *Rogers v. Goss*, 17 Feb. 130.

(i) *Potts v. Reynolds*, 3 Atk 506.

(k) *Longman v. Oallford*, 3 Austr. 507.

(l) *Andree v. ...*, 3 Dick. 765.

withdrawn; but there must be an affidavit, as is the practice in the exchequer, stating the deponent's information and belief that it is essential to the justice of the case. (m)

Motions, after Demurrer, Plea, or Answer, and before Decree.

The general doctrine as to motions has before been observed upon. (n) Those most commonly resorted to in this stage of a suit, are,

1. *Motion to refer Answer for Scandal or Impertinence.*

If an answer contains any thing scandalous, the court will, on a motion, of course, refer it to the master. The court sends it to the master immediately, from the impossibility of the court to inquire itself, in the first instance, and from considerations of delicacy of character. (o)

In these cases the court always shows an anxiety to keep the record pure; and the court, it seems, even without a motion, and on the application of a person, not a party to the record, would interfere. (p)

But if the matter of an answer be *relevant*, whatever be the nature of it, it is not *scandalous*: *and nothing is considered as *278 irrelevant, that may have an influence upon the suit, attending to the nature of it. (q)

A defendant may obtain a reference for scandal contained in the answer of a codefendant. (r)

Though the answer be referred for insufficiency, it may afterwards be referred for scandal. (s)

If an answer is referred for scandal, and reported scandalous, and scandal is expunged from the record, the party cannot afterwards except to the report, because it does not appear on the record what the scandal was, and the parties were faulty in not excepting sooner. (t)

(m) *Perks v. Wigan*, 1 Ves. and Bea. 221.

(n) *Ante*, p. 170. etc.

(o) *Coffin v. Cooper*, 6 Ves. 515.

(p) *Ibid*, 514.

(q) *Lord St. John v. Lady St. John*, 11 Ves. 539. *Coffin v. Cooper*, 6 Ves. 514.

(r) *Coffin v. Cooper*, 6 Ves. 144.

(s) *Ellison v. Burgess*, mentioned in note to 2 P. Wms. 312.; and see 6 Ves. 453.

(t) *Harrison's Pract. edit. Newland*, p. 193., who cites 2 P. Wms. 181.

So, if an answer contain *impertinence*, a motion may be made to refer it, so that it may be expunged.

It has been said there is no established rule of the court within what time an answer may be referred for *impertinence*; (u) but after the answer has been *replied* to, or after the plaintiff has undertaken to speed the cause, it cannot, it seems, be referred for *impertinence*. (v)

Impertinence, however, has been ordered to be expunged, even at the hearing of the cause. (w)

If an answer be considered as *impertinent*, and also *insufficient*, an application should first be made to refer the answer for *279 *impertinence*, and a report *should be obtained, before the motion to refer for *insufficiency*; for one master may consider that as *impertinent*, which another master might think necessary, and which supplied the deficiency; (x) and it has been held, a reference for *impertinence* is waived, by a reference for *insufficiency*. (y) After a reference for *insufficiency*, the answer cannot be referred for *impertinence*. (z)

A *schedule* to an answer containing a bill of costs at length, and observations with reference to a bill formerly delivered for the same business, was considered as *impertinent*, though the bill called upon the defendant to set forth how he computed and made out his demand, with all the particulars relating thereto, with interrogatories pointed to the particular *items*, and to a minute comparison of the two bills. The defendant ought to have *referred* to the former bill of costs. (a)

If, in an answer to an *amended* bill, the defendant puts in a complete answer over again, instead of referring to his former answer, it may be referred for *impertinence*; (b) and if, upon such reference, such parts of the answer are reported to be *impertinent*, they will be struck out as such, with costs. (c)

If the plaintiff refers the answer for scandal and *impertinence*, and the master finds the answer is neither scandalous nor im-

(u) *Kinworthy* against *Allen*, 1 Bro. C. C. 400. overruling what is said, 2 Ves. 631. (x) *Thomas v. —*, 14 Ves. 537. in note.

(v) See *Barnes v. Saxby*, cited in Mr. Newland's edit. of *Harrison's Ch. Pract.* 192.

(w) *Anon.* 2 Eq. Ca. Abr. 68.

(y) *Pellew v. —*, 6 Ves. 456.

(z) *Ib.* 458.

(a) *Alsager v. Johnson*, 4 Ves. 217.

(b) *Hildyard v. Cressy*, 3 Atk. 393.

(c) *Mitf. Plead.* 253.

pertinent, the *plaintiff, in his exceptions to the master's report, must show, wherein, in what line or page, and how far the matter is scandalous, or impertinent, so that such part of the answer may be expunged by the master: and it is not sufficient to say, generally, that the answer is scandalous and impertinent.(d)

A motion to refer *depositions* for scandal, may be made as of course, without notice;(e) but, it seems, the deponent cannot be made to pay the costs of scandalous or impertinent depositions, since it was the commissioner's fault to take down such deposition.(f)

2. Motion that Plaintiff may elect to sue at Law or in Equity.

It is a rule that, *after* an answer has been put in, and the plaintiff proceeds at law, the defendant may, by a motion of course.(g) require him to *elect*, in which court he will sue;(h) but, *before* an answer, the plaintiff cannot be put to his election.(i)

After the order to make an election is served on the plaintiff's clerk in court, he has eight days to show cause against making his election; *if he elects to proceed at law, his bill in equity will stand dismissed, with costs. If he elects to proceed in equity, an injunction issues to stay his proceedings at law.(k)

It has been said to have been held, that where a man is put to his election, whether to proceed at law or in equity, if the bill be for land, and to have an account of the mesne profits, he may elect to proceed in an ejectment at law for the *possession*, and in equity upon the *account*; because at law he can recover damages for mesne profits, from the time only of the entry laid in the declaration;(l) but this seems laid down too generally; for if a man brings an ejectment bill for possession, and an

(d) Craven v. Wright, 2 P. Wms. 182. ty, 319.; and see Jones v. Lord Stafford, 3 P. Wms. 90. Anon. 1 Ves. jun. 91., cited in note to Mitf. Pleadings, 200.

(e) Eastham v. Liddell, 12 Ves. 201. Irish v. Rooke, mentioned in Price v. Shaw, 2 Dick. 733. (f) Jones v. Earl of Strafford, 3 P. Wms. 90. Tillotson v. Ganson, 1 Vern. 103.

(g) Anon. 2 P. Wms. 405.; and see Cocks v. Worthington, 2 Atk. 235. (h) Harrison's Ch. Pract. Newl. edit. 318.

(i) Anon. 1 Ves. jun. 91. Garish v. Donovan, 2 Atk. 166. (j) Anon. 1 Vern. 105.

(k) Mocher v. Reed, 1 Ball and Beat-

account of rents and profits, where there is no mixture of equity, the court will oblige the plaintiff to make his election to proceed in equity or at law, and, if at law, he must proceed for the whole there: unless, perhaps, in the instances of a bill by an infant, in which case the court might elect him to proceed at law, and retain the bill for the mesne profits.(m)

But though it is a general rule that when a party is suing in equity he shall not be allowed to sue at law for the same thing; yet the case of a mortgagee is an exception to this rule; he having a right to proceed in equity and at law at the same
 *282 time;(n) nor will the court stop the *proceedings at law, unless the defendant brings in the money.(o)

If the plaintiff strikes out of his bill the prayer for relief, and confines the bill to a discovery only, he will not be put to his election.(p)

And where the representative of an intestate is seeking to give a preference, by confessing judgments, the court will give the plaintiff leave to proceed at law to recover judgment, with a *cesset executio*, and yet suffer him to proceed in equity, for a discovery and account of assets.(q)

A dismissal upon a bill, upon an election to proceed at law, is not peremptory; and if the plaintiff fails at law, he may bring a new bill.(r)

3. *Motion on Bills for specific Performance to see if a good Title can be made.*

After an answer submitting to perform a contract for a purchase, if a good title can be made, a reference to the master will, on motion, be directed, to inquire whether a good title can be made, and whether it appears upon the abstract that a good title could be made;(s) but such references are limited to cases where the *title only* is disputed; and, therefore, where the question between the parties was, whether, upon a contract for

(m) See *Dormer v. Fortescue*, 3 Atk. 129.

(n) *Schoole v. Sall*, 1 Sch. and Lefr. 178. *Burnell v. Martin*, 2 Dougl. 417.

(o) *Rees and Parkinson*, 2 Anstr. 497.

(p) *Fitzgerald v. Succomb*, 2 Atk. 85.

(q) *Barker v. Dumaresque*, 2 Atk. 119. S. C. Barn. 277.

(r) *Countess of Plymouth v. Bladen*, 2 Vern. 32.

(s) *Wright v. Bond*, 11 Ves. 39.

the sale of a lease, the vendor must be considered *as having undertaken to produce the lessor's title, the order, it was held, could not be made.(t) If the answer, upon reasons *solid* or *frivolous*, insists the agreement ought not to be executed, there, unless the objection is removed by consent, no reference will be made.(u)

Upon a bill for *an account*, it was held that the defendant could not, upon motion, immediately after the putting in of the answer, have a reference to the master to take the account.(v)

4. *Motion to dissolve Injunction.*

Where an injunction has been obtained till answer, or further order, upon the coming in of the answer, it is a motion of course, for an order *nisi* to dissolve the injunction; and an order will be made that the injunction shall be dissolved, unless the plaintiff shall, on a day mentioned in the order, show good cause to the contrary. If no cause is shown, the injunction is then on motion dissolved. If some only of the defendants have answered, the injunction will be dissolved only as to those that have answered.(w)

On a motion to dissolve an injunction *nisi*, at the last seal after Trinity term, the plaintiff cannot have time till the next day of motions, upon the usual undertaking to show cause on the merits, as that would, in effect, be continuing the *injunction to *284 seal before *Michaelmas* term; but, in such case, the court permitted cause to be shown during the petitions.(x)

The plaintiff may show for cause against dissolving the injunction, either, that he has filed exceptions to the answer,(y) or, merits confessed in the answer, sufficient to entitle the plaintiff to the continuance of the injunction. If exceptions are shown as cause, the plaintiff will be compelled to obtain the master's report on his exceptions within a very short time, (the old rule was four days,(z) but generally a week is allowed,) or the injunction will be dissolved. If the master reports the an-

(t) *Gomperts v. —*, 12 Ves. 17.
(u) *Blyth v. Elmhurst*, 1 Ves. and Bea. 3; and see *Paton v. Rogers*, *ib.* 382.

(v) *Eldridge v. Porter*, 14 Ves. 139.

(w) *Joseph v. Doubleday*, 1 Ves. and Bea. 497.

(x) *Robinson v. Wardell*, 5 Ves. 532.

(y) *Gooding v. Woodham*, 14 Ves.

536.

(z) 1 Ves. and Bea. 505.

swer sufficient, that will also operate to dissolve the injunction without any further motion, though that is different in the exchequer ;(a) but the plaintiff may take exceptions to the report, on which he must immediately obtain the opinion of the court. If the master reports the answer insufficient, the injunction will be continued till the exceptions are answered ; which being done, the defendant must move again to dissolve the injunction, and the same cause may be again shown by the plaintiff for its continuance.(b)

If the master reports the answer insufficient, and the report is excepted to, and the exception is argued before the master of
 *285 the rolls, and allowed, *the injunction is dissolved ; nor can it be revived on the ground of an appeal from his decision.(c)

If the answer denies all the circumstances upon which the equity is founded, the universal practice, as to the purpose of dissolving or not reviving the injunction, is, to give credit to the answer ; and that is carried so far, that unless in a few instances, such as in cases of waste, and the infringement of patents, though five hundred affidavits were filed, not only by the plaintiff, but by as many witnesses, not one could be read to prevent dissolving the injunction.(d)

The exceptions have been extended to other cases, but Lord Eldon disapproved of it.(e)

Though even an indictment for perjury upon the answer has been found by the grand jury, still the answer has been allowed to maintain its ground, and an injunction was held not to be thereby revived.(f)

Replying to an answer and serving a subpoena to rejoin, and giving rules to produce witnesses, will not prevent a defendant from moving upon his answer to dissolve an injunction.(g)

*286 If an answer be referred for impertinence, it is *good cause against dissolving of an injunction.(h)

(a) 3 Anstr. 255.

(b) 1 Turn. and Ven. 248.

(c) Scott v. Mackintosh, 1 Ves. and Bea. 504.

(d) See Isaac v. Humpage, 1 Ves. jun. 427. S. C. 3 Bro. C. C. 463. Strathmore v. Bowes, 2 Dick. 673. and the cases there mentioned by the Register. Gibbs v. Cole, 3 P. Wms. 254., and al-

so Potter against Chapman, Amb. 99. ; but see Somerville v. Mackler, 3 Anstr. 658.

(e) Berkley v. Brymer, 9 Ves. 356. ; and see Hanson v. Gardiner, 7 Ves. 311.

(f) Clapham v. White, 8 Ves. 35.

(g) Molineux v. Luard, 2 Dick. 684.

(h) Fisher v. Bayley, 12 Ves. 18. S.

Upon showing cause against dissolving an injunction upon the coming in of the answer, in a case of an alleged piracy of a work, it will be referred to the master to see whether they are the same compilation.(i)

If the answer denies any intention of committing waste, the injunction will be dissolved;(k) but it is not a sufficient inducement to the court to dissolve an injunction for staying waste, that the defendant in his answer swears he has not committed any waste *since the filing of the bill*: for, as he admits he has done waste before, the court will presume he may do further waste.(l)

Where an injunction was obtained, and a commission to examine witnesses in India, and the commission had been obtained two years, and not returned, the injunction was on motion dissolved.(m)

5. *Motions for Amendment of Pleadings.*

If the plaintiff conceives, from any matter offered by the defendant's plea or answer, that his bill is not properly adapted to his case, he may obtain leave to amend his bill, and suit it to his case.(a)

An *amended bill* is considered as an original *bill;(b) but new *287 subpœnas are not necessary,(c) unless, perhaps, where there is a new engrossment of the bill; for where there is not a new engrossment, the plaintiff undertakes to amend the defendant's copy, and that gives him notice.(d) And where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor, consequently, have any order for time to answer:(e) and, it seems, that by amending the

P. Goodinge v. Woodhams, 14 Ves. 534. another, 1 Ves. jun. 210. Angerstein and contra, Milner v. Golding, 2 Dick. 672. Clarke, Ib. p. 250.; and see Hail v.

(i) Carnan against Bowles, 2 Bro. C. Camp, Bagshaw v. Batson, 1 Dick. C. 84. — v. Leadbetter, 4 Ves. 108. 113.

681. (c) Ib. 1 Ves. jun. 250.; and see Skeffington v. —, 4 Ves. 66.

(k) Strathmore v. Bowes, 2 Bro. C. C. 88: (d) See Hail v. Camp, 1 Dick. 199.;

(l) Anon. 3 Atk. 485. and see Arg. in Carleton v. Menzies, 10

(m) Penny v. Edgar, 1 Anstr. 276. Ves. 443.; see also Vernon v. Vawdry,

(a) Mitf. Plead. 256. 2 Atk. 199.

(b) Lord Abingdon v. Butter and (e) Gill v. Matthews, 3 Anstr. 379.

bill, the defendant is no longer bound by submissions in the answer. (f)

It is said that defendant may, without notice, move to amend his answer in a *small matter*; but if it be in a material point, he must give notice of the motion: and though it be in a material point, and after issue joined, the court will, on an affidavit of *surprise*, and payment of costs, allow of an amendment. (g)

In one case, it is said, that after a third order of amendment, a defendant will be allowed taxed costs; (h) but in other cases, it is held, that though the plaintiff amends several times after answer, *yet he shall not pay taxed costs, but only forty shillings. (i) *unless there is particular oppression.* (k)

After an answer to a bill of discovery only, a motion as of course, to amend the bill, by adding a *prayer for relief*, was refused, with costs. (l) Such an amendment might, perhaps, upon a special application, be allowed; but even in those special cases, Lord Eldon seemed to think, it would be better to direct the plaintiff to pay the costs, and bring a new bill: and if in that case any use is to be made of the discovery given by the first answer, to let it be read as an answer to a bill of discovery, as evidence; not as part of the defence, or admission, upon which the bill proceeds. (m)

After a *demurrer* or a *plea*, which is not set down, an amendment may be made of the bill, on payment of twenty shillings costs. (n) and the plea is not thereby allowed; (o) and after a plea is set down, it may be amended on payment of twenty shillings costs, and five pounds for the plea: so, a *demurrer* may be amended; but after a *demurrer* is set down and argued, the bill cannot be amended. (p)

After witnesses are examined, the bill cannot be amended, (q) unless the plaintiff withdraws his replication. (r)

(f) Lord Abingdon v. Butter, 1 Ves. jun. 210.; but see Spurrier v. Fitzgerald, 6 Ves. 548.

(g) 1 Eq. Cas. Abr. p. 29. in marg. Chute v. Lady Dacre, 1 Cha. Ca. 29.; but see Harcourt v. Sherrard, 2 Vern. 433.

(h) Weedon v. Fell, 2 Atk. 123.

(i) Deggs v. Colebrooke, 1 Atk. 396.

(k) Earl of Masserene against Lyndon, 2 Bro. C. C. 291.

(l) Butterworth v. Bailey, 15 Ves. 358.

(m) *Ib.* 363.

(n) 1 Ves. jun. 448.

(o) 2 Dick. 441.

(p) 2 P. Wms. 300. 1 Dick. 67. cited Harrison's Ch. Pract. Newl. Edit. p. 62.

(q) Mitf. Plead. 260.

(r) 1 Atk. 61. 1 Ves. jun. 148.

*After a cause is set down, unless in the case of an infant,(r) an amendment is only permitted for the purpose of making parties; and no new charges can be introduced, or any material fact put in issue, which was not so in the cause before; for such a purpose, a *supplemental bill* is necessary.(t)

But a mistake merely clerical may be amended, even after a cause is brought on to be heard. As where, on a bill filed by some parishioners, the usual words, on "*behalf of themselves and all other the parishioners,*" were, by mistake, omitted, and an objection was made on that ground, the chancellor thought he might allow the amendment, even in that stage of the cause;(u) and a greater indulgence than that has been allowed; such as an amendment, by striking out the names of several plaintiffs named in the bill, and also part of the prayer of the bill, *between the hearing of the cause, and the giving of the judgment.*(v)

So, after a decree, an amendment, making an administrator a party, has been permitted. If any thing in the decree affected him by way of order to pay, the amendment would not have been permitted, but being merely that he might be a witness to what was done, it was allowed.(x) If a new examination is necessary, a *supplemental bill* must be filed.(y)

*Whether an answer may be amended or not, is very much *290 in the discretion of the court.(y)

Where a defendant has mistaken a *fact*, or a *date*, the court has given him leave to amend his answer, and has also, under particular circumstances, allowed him to add a new fact.(z)

Where a defendant, an executor, had, by *mistake* in his answer, *admitted assets*, an amendment has been admitted.(a)

The rule, however, now seems to be, not to permit an amend-

(r) Pritchard v. Quinchant, Ambl. 149.

(s) Goodwin v. Goodwin, 3 Atk. 370; and see Jones v. Jones, 3 Atk. 111.

(t) Attorney General v. Newcomb, 14 Ves. p. 6.

(u) Wollands v. Clowcher, 12 Ves. 174; and see also Park v. Clinton, 1b. 66.

(v) Fox v. Mackreth, 1 Ves. jun. 69.

(x) Jones v. Jones, 3 Atk. 110.

(y) Woodgate v. Fuller, Barn. 50.

(z) Wharton v. Wharton, 2 Atk. 204. Paterson v. Slaughter, Ambl. 292. Alpha v. Payman, 1 Dick. 33.

(a) Young and Walter, 9 Ves. 366. Dolder v. Bank of England, 10 Ves.

284; and Dagley and Crump, 1 Dick. 36. and vid. Rawlin v. Powell, 1 P.

Wms. 296. Spurrier v. Fitzgerald, 6 Ves. 556.

ment of the answer where there has been a mistake, but that the defendant must move to put in a supplemental answer, (b) and accompany the motion with an affidavit, in which he must swear, that, when he put in the answer, he did not know the circumstances upon which he applies, or any other circumstances, upon which he ought to have stated the fact otherwise; (c) or that, when he swore to his original answer, he meant to swear in the sense which he now desires to be at liberty to swear to; (d)

An amendment of an answer will not be permitted after an indictment for perjury preferred, or threatened, in order to avoid the indictment. (e)

- *291 An answer has been allowed to be amended, even after a hearing and a decree, on an affidavit of the solicitor and his clerk, that the mistake was in the engrossing the answer from the draft, the draft being produced. (f)

An infant has been permitted to amend his answer, after the cause has been brought on to be heard. (g)

If executors on a suit against them admit assets, the plaintiff may set down the cause upon the bill and answer, and have a personal decree against the defendants for their demands. (h) By the admission of assets, executors make themselves liable for what may be found due on the account in respect of interest; (i) but, an admission of assets by an executor's answer is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed; (k) but an admission of assets by one executor does not prevent the plaintiff proceeding against the other executor. (l)

Though a case may be made which will enable the court to

(b) It is so in the exchequer, *Harris v. Drewesay*, 3 Anstr. 717.; and see 2 Anstr. 443.

(c) *Wells v. Wood*, 10 Ves. 401.; and see *Jennings v. Merton College*, 8 Ves. 79., and also *Dolder v. Bank of England*, 40 Ves. 223.

(d) *Livesey v. Wilson*, 18 Ves. 152.

(e) *Earl Verney against Mansamara*, 1 Bro. C. C. 449.; see contra, *Woodgate v. Fuller*, Barn. 60.

(f) 2 P. Wms. 427.

(g) *Fawcner v. Watts*, 1 Atk. 405.

(h) *Wall against Busby*, 1 Bro. C. C. 433.

(i) *Tew v. Lord Winterton*, cited 4 Ves. 606.; and see *Fontes v. Foster*, 2 Bro. C. C. 619. *Horsley v. Chaloner*, 1 Ves. 85.

(k) *Wall against Busby*, 1 Bro. C. C. 433.

(l) *Morston v. Turville*, 2 P. Wms. 145.

relieve the executor from his admission of assets; yet it must be a very strong case. (m)

As if the money is in a banker's hands, who *fails. To ob-
viate an admission of assets, a mistake must be proved, and
that the circumstance on which he built his admission failed. (n)

After a general admission of assets, a defendant has been permitted to amend her answer by admitting assets to pay the plaintiff's debts, *if the same did not exceed 400*l.** (o)

Liberty has been given to the defendant, after publication, to amend his answer by striking out the admission of the plaintiff's pedigree; (p) but the court will not allow a defendant to amend an answer by striking out of it the admission of a fact, where he does not swear he was surprised into the admission, or ill advised in setting it forth.

An admission of a point of law, or of a consequence in law, or a consequence in equity, does not bind the party, because the court is to judge of the law. (q)

The answer of a *feme covert* will not bind her as to her inheritance, or her husband. (r)

If an answer misnames the plaintiff, it is to be considered as no answer, nor is the defendant bound by it. In such case there are many instances of permitting answers to be taken off the file and re-sworn; but where the defendant has *discovered *293 that there is contained in it what is false, innocently, according to his representation, disputed however by the plaintiff, the court will not order him to do an act that may expose him to an indictment for perjury, but will direct the paper writing, purporting to be an answer, to be taken off the file. (s)

A disclaimer by answer cannot be got rid of without a strong case upon affidavit. (t)

(m) Roberts and Roberts, mentioned Arg^o. 1 Bro. C. C. 487.

(n) Honley v. Chaloner, 1 Ves. 33.; but see Roberts v. Roberts, 2 Dick. 573, where executor held to his admission of assets though estate turns out insufficient.

(o) Degby v. Crump, 2 Bro. C. C. 619. In note 8. C.

(p) Kingscote v. Bainsley, 1 Dick. 485.

(q) Pearce v. Grove, 3 Atk. 523. 8. C. Ambl. 65.

(r) Evans v. Cogan, 2 P. Wms. 451.

(s) Griffiths v. Wood, 11 Ves. 62, 3.

(t) Seton v. Shade, 7 Ves. 287.

If an executor charge himself by his answer, he cannot discharge himself before the master by his affidavit of the payment of different sums to the testator in his life.(u) If a man admits, by his answer, he has received certain sums, which he had paid, &c. the discharge following immediately in the same sentence, that will do;(v) but if he says, that upon a particular day he received a sum of money, and upon a subsequent day he paid it over, that cannot be used in his discharge.(w)

When an answer is amended, it must, in the case of a common defendant, be resworn; and in the case of a peer, must again be attested upon honour: and this, even though the amendment be only in the title of the answer.(x)

*294 If a bill be filed, and an answer put in, and exceptions are taken to the answer, and allowed, the plaintiff, before the answer to the exceptions is put in, may amend his bill, and move to have the *exceptions and amendments answered at the same time;(y) and if an injunction was obtained on the filing of the bill, it will be continued till the answer to the amended bill.(z) But Lord *Hardwicke* thought the court has rather gone too far, in allowing the amendment of bills on these occasions;(a) and it has been held, that if the order to amend is not served before the defendant answers the exceptions, the defendant is not obliged to answer the amendments.(b)

Amendments of demurrers;(c) and of *pleas*, where there has been a clear mistake, have been permitted.(d)

A mistake in the title of an order has been ordered to be amended, though to charge a surety who gave a recognisance to abide the order of hearing.(e)

But where the plaintiff's christian name was mistaken in the title of the interrogatories, and the depositions could not therefore be read, the court would not permit the title to be amended, though most of the witnesses, since their examination, were

(u) *Ridgeway v. Darwin*, 7 Ves. 404.

(v) *Ib.* 405.

(w) *Thompson v. Lambe*, 7 Ves. 588.

(x) *Beacock v. Duke of Bedford*, 18 Ves. 186.

(y) See *Long v. Burton*, 2 Atk. 218.

Partridge v. Haycraft, 11 Ves. 575.

577.

(z) *Mayne v. Hochin*, 1 Dick. 255.

(a) *Anon.* 3 Atk. 512.

(b) *Knox v. Simmonds*, 1 Ves. jun.

88. *Botham v. Bateman*, 1 Dick. 296.

11 Ves. 578.

(c) 11 Ves. 70.

(d) 2 Bro. C. C. 143. 13 Ves. 435.

(e) *Spearing v. Lynn*, 2 Vern. 370.

gone to see. (f) This case is elsewhere reported; (g) and Mr. Pooley (the reputed author of the work) (h) adds, at the end of the case, "but **quare*; for this seems only a mistake of the clerk, whose errors are frequently amended, the better to carry on the justice of the court." *295

Depositions may be amended on a clear mistake. (i)

6. *Motion to dismiss Bill.*

If three terms elapse without any proceeding in the suit, an order may be obtained to dismiss the bill for want of prosecution; and this is a motion of course, and, consequently, does not require notice: (k) and the order of dismissal will be good, though, on the face of it, it appears that the *ex* clerk's certificate is dated subsequent to the order. (l)

It was formerly usual to give notice of the motion, and upon the plaintiff's undertaking to speed the cause, no order of dismissal was made: (m) but now, it is not considered as necessary that a note should be handed over by the defendant's clerk in court, previous to a motion made *before replication*, (n) for the dismissal of a bill for want of prosecution: (o) and from this correction of the practice, it seems, that the motion cannot be opposed; and the plaintiff, therefore, it has been **thought*, has not, as formerly, (p) an opportunity of undertaking to speed the cause, a practice much complained of, as affording means of delay. (q) *296

Where, upon a motion to dismiss, it is not granted, the plaintiff undertaking to speed the cause, it seems understood that

(f) *White v. Taylor*, 2 Vern. 435. *Beames*, p. 310. *Attorney General v.*

(g) 1 Eq. Cas. Abr. 30.

Finch, 1 Ves. and Bea. 368.

(h) See 1 Sch. and Lefr. Rep. 269. in note.

(i) *Naylor and Taylor*, 16 Ves. 127.

(j) 2 Dick. 677.

Jackson v. Furnell, ib. p. 205. *Attorney General v. Finch*, 1 Ves. and Bea. 368.

(k) *De Graves v. Lane*, 15 Ves. 291.

(l) *Wills v. Pugh*, 10 Ves. 402. *M'Mahon v. Sisson*, 12 Ves. 465.

(m) As to the former practice, see *Bligh v. —*, 13 Ves. 455., and the cases referred to in note.

(n) See *Lyon v. Dumbell*, 11 Ves. 608.

(o) See Mr. Vesey's note to *Naylor and Taylor*, 16 Ves. 127.; and see 1 Ves. and Bea. 370.

(p) See *Browne v. Byne*, 1 Ves. and

the plaintiff, according to the ancient practice, (r) has the term and the vacation to proceed: (s)

The defendant's becoming a bankrupt does not disable him from moving to dismiss: (t)

Where a bill is filed merely for a discovery, and prays no relief, a motion cannot be made to dismiss for want of prosecution; but an order should be prayed for, upon the plaintiff, to pay to the defendant the costs of suit, to be taxed by the master: (u)

A party is entitled to give and abandon three notices of motion for the dismissal of a bill for want of prosecution; but he cannot give a fourth notice, unless he has paid the costs of the three previous notices: (v)

If, after notice of a motion for the dismissal of a bill, the plaintiff applies by petition to the rolls, and obtains an order to amend on the day on which the motion would have been made, if the seal had not been continued, this is regular: (w) *297 but an order to amend, not served or drawn up, does not prevent a motion to dismiss the bill for want of prosecution: (x)

If a replication to an answer be filed before a motion to dismiss, an order for that purpose cannot be obtained: (y)

An order obtained for the dismissal of a bill, may, upon special circumstances, and payment of costs, be discharged on motion: (z)

In a case (a) where the defendant had destroyed the subject of the suit and absconded, it was determined, on a motion for that purpose, that he should find security for costs, otherwise the plaintiff should be permitted to dismiss his own bill, but without costs.

One defendant may move to dismiss, though the other defendant stands out process of contempt, and it is of no use to go to a hearing without him.

(r) *Mangleman v. Prosser*, 3 Bro. C. C. 191.

(s) *Findlay v. Wood*, 1 Ves. and Bea. 499.

(t) *Monteith v. Taylor*, 9 Ves. 615.

(u) *Woodcock v. King*, 1 Atk. 286.

(v) *Anderson and Palmer*, 14 Ves. 151.

(w) *White and Hall*, 14 Ves. 208.

(x) *Anonymous*, 7 Ves. 222.

(y) *Anonymous*, 14 Ves. 492.

(z) See *Jackson and Furnell*, 16 Ves. 204. and *Baker v. Mellish*, 11 Ves. 72.; and see *Attorney General v. Finch*, 1 Ves. and Bea. 370.

(a) *Knox v. Browne*, 3 Bro. C. C. 186.

A plaintiff can in no case dismiss his bill without costs, (b) to be taxed, (c) unless it be with consent; (d) not even where the defendant becomes a bankrupt. (e)

*A plaintiff (without notice to, or the consent of a complainant) *298 may move to dismiss his bill, so far as he is concerned, with costs. (f)

If a general demurrer be put in, which is not argued, and no proceedings afterwards, the defendant cannot have the bill dismissed for want of prosecution, as he had equally a power to move in the cause. (g)

No order can be made upon a bill that is dismissed, for that would be decreeing relief. (h)

If the plaintiff produces the order for a subpoena to rejoin, and an affidavit of some of the parties being out of the kingdom, the court will not dismiss his bill for want of prosecution; and though a bill has been dismissed for want of such order and affidavit, yet, upon producing them afterwards, and payment of costs out of pocket, the court has retained it; but on a motion to retain the bill, the plaintiff must show that the order for the subpoena to rejoin was dated before the notice to dismiss. (i)

It has been held, that a defendant cannot move to dismiss a bill after publication is completely past. (k) But a plaintiff may, in any stage of the cause, apply to dismiss his bill upon payment of costs; even after an issue has been directed; but not after a decree, or where an issue has been tried and decided in favour of the defendant. (l)

*7. *Motion for Production of Deeds, &c.*

*299

If deeds, letters, or other writings are referred to in an answer, the same will, on the plaintiff's motion, be ordered to be

(b) *Dixon v. Parks*, 1 Ves. jun. 402.

(f) *Langdale v. Langdale*, 13 Ves.

(c) *Anon.* 1 Vern. 116. *Anon.* 2 P. 167. Wms. 387.

(g) *Anonymous*, 2 Ves. jun. 287.

(d) *Anon.* 1 Ves. jun. 140. *Fidelle* against *Evans*, 1 Bro. C. C. 267.

(h) *Bonnet College* against *Carey*, 3 Bro. C. C. 390.

(e) *Rutheford v. Miller*, 2 Anstr. 458.

(i) *Anonymous*, 2 Atk. 604.

(k) *Skip v. Warner*, 3 Atk. 558.

(l) *Carrington v. Holly*, 1 Dick. 280.

left with the defendant's clerk in court, for the inspection of the plaintiff, his solicitor or agent. (m)

Whenever a deed is made part of the answer, and the contents are, in a great measure, set forth, and the instrument is referred to for the truth of what is set forth, the production will be ordered; (n) but where the answer admits the execution of an agreement, and craves leave to refer to it when produced, but there is no admission that it is in the possession or power of the defendant, a production will not be ordered. (o)

If an heir in tail files a bill against devisees, and they by way of schedule set forth an abstract of several settlements in their possession, the court will not order an inspection of all the deeds, but only of such deeds, in the possession of the defendants, as created an estate in tail general. (p)

Where the defendant alluded by his answer to a deed, not impeached by the bill, as, for instance, a release of all claims whatsoever, "as in the said indenture will appear," and claiming the same benefit as if he had pleaded it, Lord Eldon said, *300 "he must produce that instrument at the hearing of the cause; but his answer means only, that in this stage he does not put his defence on a plea with profert, stating merely that there is such an instrument, which is to be his defence if he shall produce it, not otherwise." (q)

If a defendant submits to produce a deed, he will be obliged to do so, before the hearing, if the court thinks fit (r), but a qualified submission to produce a deed, "if the court shall require it," does not fix the defendant, and deprive him of the discretion of the court, as to the propriety of the production. (s)

Where a bill seeks a discovery of deeds, and relief, the court will not, upon motion, aid the plaintiff in proceeding at law, by ordering a production of deeds, &c. at the trial of an ejectment, that being relief the party is entitled to only on a decretal or-

(m) 3 P. Wms. 304. 11 Ves. 42.

(n) Atkins v. Wright, 14 Ves. 214; and see Herbert v. Dean and Chapter of Westminster, 1 P. Wms. 775.

(o) Darwin v. Clarke, 8 Ves. 158.

(p) Lord Shaftesbury and Arrow-smith, 4 Ves. 66.

(q) Ib. p. 211. etc.; but see Gardner against Mason, 4 Bro. C. C. 479.

(r) Stanhope v. Roberts, 2 Atk. 214.

(s) Atkins v. Wright, 14 Ves. 213.

der ;(t) but it would be ordered to be produced before the clerk in court.(u)

If the bill prayed only for a *discovery*, and not for relief, the deeds, it seems, would be ordered to be produced.(v)

The court will not order that the defendant may inspect a deed proved in the cause, and referred to by the deposition as being part thereof, unless the same is set forth at length ;(w) for the *defendant, before the hearing, is not to see the strength *301 of the cause, or any deed, to pick holes in it.(x)

So, if letters are referred to by the plaintiff's deposition, as *exhibits*, the defendant is not entitled to an inspection of them.(y)

The court will not order deeds to be delivered out of court, to a *devisee*, unless the heir is before the court.(z)

When the heir at law, by his answer to a bill brought to establish a will, admits it to be duly executed, he is not entitled to the inspection of the title deeds and writings belonging to the estate ; but if, by his answer, he insists upon some old entail which has not been barred by a recovery, or controverts the legality of the will, or the execution of it, or insists that only a part of the real estate is devised away, he is entitled to such inspection.(a)

A peeress will be ordered to produce deeds confessed in her answer on *honour* only, and not on oath.(b)

It is not sufficient that the party swears that he has no books, evidences, &c. to *his knowledge*, concerning the matters in question, but those produced ; but he must swear without the introduction of the words *to his knowledge*.(c)

*A will referred to in the defendant's answer, but not offered *302 to be produced, was, on motion, ordered to be produced.(d)

If a defendant to a bill, seeking the discovery of a correspondence, sets forth, by his answer, extracts of letters, and swears

(t) *Aston v. Lord Exeter*, 6 Ves. 288.
Hylton v. Morgan, 6 Ves. 293. ; and
 see *Aston v. Aston*, 3 Atk. 302.

(u) 3 Atk. 302.

(v) *Hylton v. Morgan*, 6 Ves. 294.

(w) *Houson v. Earl Winnington*, 3 P. Wms. 85.

(x) *Davers v. Davers*, 2 P. Wms. 410. S. C. 2 Str. 764.

(y) *Wiley v. Ripter*, 7 Ves. 411.

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(z) *Anon.* 1 Ves. jun. 29.

(a) *Potter v. Potter*, 3 Atk. 719.

(b) *Duke of Hamilton v. Lady Gerard*, Prec. Ch. 92. and case there cited. See *vid.* Sir Wm. Jones, 152, Salk. 512.

(c) *Mayor of Hartford v. Poor of Hartford*, Vin. Abr. tit. Chan. (S. a. pl. 10.)

(d) *Bird v. Harrison*, 15 Ves. 408.

they are the only parts of the correspondence upon the subject, it is sufficient : (e) and a defendant, it seems, cannot be compelled to produce *confidential letters* ; (f) nor will the court compel an attorney to produce papers of his client. (g)

Where, in the answer, a reference is made to extracts from books of account, the defendant, on production of them, may seal up those parts of the books which he swears to be immaterial. (h)

If an order be made that defendant should produce before the master, all books, papers, &c. and the master is satisfied with the production that is made, but the plaintiff is not, he may apply to the court for an order that the master should receive farther interrogatories for the examination of the defendant ; (i) nor is it previously necessary for the master to be called upon to *certify* his satisfaction. (k)

Where the object of a bill is to set aside a deed, the court
 *303 has the power of so dealing with the *instrument, as to be reasonably sure of having it produced upon all occasions, where its production may be necessary. Such deed must therefore be produced for the purpose of being proved before the examiner, if necessary for the discovery of its contents ; and must be produced at the hearing, if necessary ; but the court does not take the custody of it in the interval, *without a special case*. (l) Where, therefore, a motion was made that the draft of a title deed might be deposited with the master, upon an affidavit, that the settlement prepared in pursuance of the draft varied from it ; the plaintiff being entitled to the estate according to the draft, the defendant according to the deed ; and the object of the bill being to reform the deed, and the answer stating the substance of the draft falsely ; the chancellor ordered the deed to be placed in the custody of the master. (m)

The course of proceeding for not producing deeds before the master, pursuant to a decretal order, is to apply in the first instance for an order upon the master's certificate, that the party

(e) 1 Anstr. 58.

(f) Lord Cranstown v. Johnson, 3 Ves. 179.

(g) Wright v. Mayer, 6 Ves. 280.

(h) 1 Anstr. 58.

(i) White v. Lupton, quot. 12 Ves.

392.

(k) Cotton v. Harvey, 12 Ves. 391.

(l) Beckford and Willman, 16 Ves. 438.

(m) Addison v. Walker, 16 Ves. 440.

do produce, &c. in four days, or that the sergeant do apprehend the defendant, and bring him into court to answer his contempt; and if default is made, another order must be obtained, to make the former one absolute, upon the master's certificate, *of the *304 same date with the order.(n) Should the party be taken, he is brought into court, and turned over to the fleet, and thereupon the court will of course grant a *sequestration*. So, if the sergeant at arms return *non est inventus*, the court will, upon such return, grant a *sequestration*.(o)

8. Motion for Payment of Money into Court.

Where it appears by the defendant's *answer*, or upon his examination before the master, or by the master's *report*,(a) that money is due, a motion may be made for payment of the money into court.(b) But the court will not order a balance, *upon charge and discharge* in the master's office, to be paid in, before the master has made his report.(c)

In the case of an executor admitting to have property of the testator in his hands, it was formerly thought necessary for the plaintiff to show, that the executor had abused his trust, or, that the fund was in danger from his insolvent circumstances; but that, it seems, is not now necessary;(d) and in all cases, not only upon an affidavit of the insolvency of the executor, but where there is an admission by him of a balance in his hands, after payment of debts, he will be ordered to pay the *money into court;(e) and Lord *Eldon* has frequently stated *305 the rule still more broadly, and ordered into court all moneys acknowledged by an executor's answer to be in his hands, except what might be necessary to be immediately applied.

If the answer contains a schedule not cast up, the sum may be cast, and on an affidavit of the amount of what so appears due, a motion may be made for payment of the money into court.(f)

(n) *Carlton v. Smith*, 14 Ves. 160.

(d) *Strange against Harris*, 3 Bro. C.

(o) See register's statement of Pract.

C. 365.

2 Dick. 693. etc.

(e) *Blake v. Blake*, 2 Sch. and Left.

(a) *Gordon v. Rothby*, 3 Ves. 673.

26. *Rutherford v. Dawson*, 2 Ball and

(b) *Quarrel and Beckford*, 14 Ves.

Beatty, 17.

178.

(f) *Quarrel v. Beckford*, 14 Ves.

(c) *Fox against Macraeth*, 3 Bro. C. 178.

C. 45.

But where the defendant, by his examination, does not admit that any thing is due, the plaintiff is not allowed to calculate the items of the schedules, and without reference to the principles on which the account is to be taken, move to have what appears on such calculation paid in.(g)

The motion is founded on the *admission* of the party; and therefore it is not sufficient to cast up books brought into the master's office, unless connected with an admission by the defendant, so as to make those books as much a part of his examination as the schedules are part of the answer. If *all* the books of a partnership are referred to in the answer, a motion cannot be made for payment of money appearing to be due on the cash book and ledger only.(h)

***306** Money in the funds belonging to wards of the *court, cannot, it has been held, be transferred into the name of the accountant general, to the credit of the cause, until the account is taken by a master, and his report made.(i)

If the vendor resists a motion by the purchaser, for payment into court of the deposit in the hands of the vendor's agent, he will be charged with a loss occasioned by the agent's failure.(k)

A purchaser of an estate, in possession, against whom a bill for a specific performance had been filed, and an answer put in, insisting that the plaintiff was an alien, was ordered to pay in the purchase money, or give up the possession of the estate.(l)

If money is not paid into court, pursuant to an order for that purpose, a motion, after notice, may be made, that the defendant shall pay it in within a limited time,(m) usually a week or ten days; and if the order made on such motion is not complied with, a writ of execution issues,(n) unless the order for payment of the money is made against a person who is not a party to the suit, in which case it is the practice, first to get an order for payment on a given day, and if he does not pay, then another order is obtained, that he shall pay by another day, or *stand committed*.(o)

(g) *Ib.* 180.

(h) *Mills v. Handson*, 8 Ves. 68. 91.

(i) *Bencraft against Rich*, 1 Bro. C. C. 58.

(k) *Fenton v. Browne*, 14 Ves. 144.

(l) *Clarke v. Wilson*, 15 Ves. 317.

(m) 3 Bro. C. C. 372.

(n) *Higgins v. —*, 8 Ves. 381.

(o) *Anonymous*, 14 Ves. 207.

*If, on a bill filed by a legatee, the executor admits assets, a motion, it seems, may be made, to transfer to the amount of the legacy into the three per cents. in the name of the accountant general, to that account.(p)

On a bill filed by a trustee to have accounts taken, &c. a motion may be made by a legatee that part of his legacy may be paid to him, without prejudice to the question out of what fund the legacy is to be paid, there being a clear surplus, the trustees, and all other competent parties consenting, and no opposition on the part of the infants.(q)

8. *To take Bill and Answer off the File.*

If a suit be ended by compromise, the bill and answer will, by consent, on motion, be ordered to be taken off the file.(r)

9. *For a Commission to examine Witnesses, &c.*

If the plaintiff files his replication in term, he may sue out a subpoena against the defendant to rejoin, returnable in term, but this rarely happens, unless the defendant lives in town, and may be easily served with the subpoena: the more usual way is to apply by motion or petition, which is of course, for a subpoena to rejoin, returnable immediately, and that service on the defendant's clerk in court may be deemed good service; and, *if *308 it is a country cause, the motion or petition also prays that the plaintiff may be at liberty to take out a commission for the examination of witnesses, and that the defendant may join and strike commissioners' names in four days after notice of the same, or that, in default, the plaintiff may have a commission to examine witnesses, directed to his own commissioners.(s)

The mode of joining in commission is this: he who has the carriage of the commission names a commissioner, then the other party names one, and so alternately, till each has named four, and afterwards each party strikes out two of the names of the commissioners named by his adversary, and the remaining four are the commissioners.(t)

(p) Pullen v. Smith, 5 Ves. 23.

(q) Pearce v. Baron, 12 Ves. 459.

(r) Tremaine v. Tremaine, 1 Vern. 189.

(s) See Harrison's Ch. Pract. Newl. Ed. 242.

(t) See Ib. 244.

Where witnesses reside within twenty miles of London, they are examined by an examiner appointed for that purpose, and no commission is necessary.(u) Examiners, it seems, have no authority to take depositions in the country.(v)

A commission for the examination of witnesses, returnable *sine dilations*, must be executed before the second return of the next term after the commission issues, and if executed after, it is void, and the depositions will be suppressed.(w)

The first application for a commission, and the carriage of it, *309 is the privilege of the plaintiff, but *the defendant, if he thinks proper, may move for a commission, and, in some cases, the defendant may obtain a commission for the examination of his own witnesses only, and have the carriage of it, as where the plaintiff will not go on to commission, or the witnesses live distant from the plaintiff's witnesses, or are beyond sea, or the plaintiff has no witnesses; but the plaintiff may join in such commission, and cross examine the defendant's witnesses on the plaintiff's interrogatories, or examine other witnesses on such commission.(x)

He who has the carriage of the commission must give fourteen days' notice, under his commissioners' hands, of the time and place where the commission will be executed, and such notice must be given to all the defendants who join in such commission.(y)

If there be any irregularity in the execution of the commission, the depositions will be suppressed.

A plaintiff may serve any two of the defendant's commissioners, with the notice of the execution of it, and not such two as the defendant chooses.(z)

If a witness who has been served with a *subpoena ad testificandum*, refuses to attend, he will be ordered to do so, and be sworn *310 in four days, *and be examined, or stand committed;(a) but he

(u) Harrison's Ch. Pract. Newl. Edit. p. 250. 259. in note. 1 Vol. Turn. and Ven. Pract. 85. in note. But see Orders in Chancery, 109.

(v) Frankland v. Frankland, 1 Dick. 281.

(w) Jones v. Mitchell, 2 Vern. 197.

(x) See Harrison's Ch. Pract. Newl. Edit. p. 245, 6.

(y) Ib. 246.

(z) Anon. 3 Atk. 633.

(a) Osman v. Fitzroy, 1 Dick. 60., and the other cases there mentioned. Henegal v. Evance, 19 Ves. 201.

is not bound to attend upon a mere summons of the commissioners, without the service of a *subpoena*.(b)

If a corporation would examine any of their members as witnesses, they must first disfranchise them. The method of disfranchising is, by an information in the nature of a *quo warranto*, against the member who confesses the information, on which the plaintiff obtains judgment to disfranchise.(c)

Interrogatories for the examination of witnesses must be signed by counsel.

The interrogatories administered to witnesses are all strung together, and the party, by his agent, points out the particular interrogatories, or parts of interrogatories, to which he wishes the witness to be examined. The reason why the interrogatories are all put together, is, that some witnesses may be called to speak to one part, some to another, and some may be examined to all.(d)

The commissioners, it seems, have power to refuse, what, in their opinion, does not amount to legal evidence; and a witness cannot demur to being examined, because the question is not *pertinent to the matter in issue*;(e) but, it seems, that a *witness *311 may demur to his being examined as a witness, if he is a party interested;(f) but such demurrers are held to very strict rules.(g) If the demurrer be overruled, the court may be moved for costs, but a *subpoena* cannot be taken out for them.

A witness may object to answering questions which have a direct tendency to criminate him, or render him liable to disabilities and pecuniary penalties.(h)

The *East-India Company*, in all shipping agreements, oblige persons to covenant, that they will discover transactions, though the answer may subject the parties to penalties or disabilities; but that applies only to a suit by the *East-India Company*, and not to any other person.(i)

Counsel, solicitors, and attorneys, are privileged from being examined in respect of matters which came to their knowledge

(b) *Wardle v. Dent*, 1 Dick. 334.

(c) *Mayer and Aldermen of Gloucester v. —*, 1 P. Wms. 596.

(d) *Whitelocke v. Baker*, 13 Ves. 515.

(e) *Ashton v. Ashton*, 1 Vern. 146.

(f) *Hildersley v. Devacher*, mentioned 2 Atk. 593.

(g) *Vaillant v. Dodmead*, 2 Atk. 524.

(h) *Paxton v. Douglas*, 16 Ves. 240.

(i) *Ib.* 242.

after they were retained; (h) but a steward, or servant, has no such privilege; (i) and an attorney is compellable to prove his client's handwriting, if called upon.

It is said, that if a counsellor or attorney *consent* to be examined, the court will not refuse the reading of his deposition; (k) but, where an attorney is examined, the court will, on *312 motion, *refer it to the master to see what part of the evidence came to his knowledge in confidence. (l)

If any stress be laid on the *handwriting* of a will, it seems, it cannot be made use of, if only the *probate* be in evidence; (m) but, on motion and notice, (for it is not an order of course,) (n) an order will be made upon the register of the court, where the will is to deliver the original will, for the purpose of being produced at the hearing, upon giving security. (o)

Lord *Hardwicke* held, that where there is a variance between the original will and the probate, the cause must stand over, and the parties are at liberty to apply to the spiritual court for amendment, and, if they see occasion, to make the proper alterations in the probate. (p)

When a commission is granted to examine witnesses to a will in the country, the court, on application, will order the prerogative court to deliver a will to be proved. (q)

And so, when a commission is granted to examine a witness to a will, *who resides abroad*, the court will, on motion, order the original will to be delivered out by the proper officer of the *313 prerogative court, upon security being given to return *the same, in order to be carried out of the kingdom. But this cannot be done, if there be any other person besides the person applying interested under the will, unless he consents. (r)

(h) *Couts v. Pickering*, Ventr. 197.

(i) *Vaillant v. Dodmead*, 2 Atk. 524.

(k) *Maddox v. Maddox*, 1 Ves. 62. Sed quæ. for the rule is adopted for the benefit of the client.

(l) *Sandford v. Remington*, 2 Ves. jun. 189.

(m) *Bishop of Cloyne v. Young*, 2 Ves. 98.

(n) *Wells and Corbyn*, 3 Anstr. 648.

(o) *Ford v. —*, 6 Ves. 802. Mod-

son v. —, lb. 135. *Forder against Wade*, 4 Bro. 476. *Williams v. Floyer*, Ambl. 343., and a case of the kind, *Lake v. Causfield*, 3 Bro. 263. *Morse v. Roach*, 2 Str. 961. S. C. 1 Dick. 65., and the case of the same kind there noticed.

(p) *Marsh v. Howe*, 2 Atk. 50.

(q) *Morse v. Roach*, 2 Str. 961. S. C. mentioned, 1 Atk. 628.

(r) See *Frederick v. Aynscombe*, mentioned, Ambl. 343.

Depositions were, before publication, suppressed, for having been taken by the commissioners *ready prepared*, and the commissioners were directed to re-examine that witness; but this order does not, in cases of necessity, prevent the court having recourse to the depositions; as if, for instance, the witness could not be again examined.

If the interrogatories are *leading*, the depositions, on a reference to the master, and his report that they are so, will, on motion, be suppressed: if one interrogatory be reported leading, the deposition only to that interrogatory is suppressed; so, if part of an interrogatory be reported leading, so much of the deposition as relates to and answers the leading part will be suppressed.^(s) Depositions will also, on motion, be suppressed for impertinence and scurrility.^(t)

Where, however, depositions are suppressed, the court will, under circumstances, allow an application for leave to exhibit new interrogatories for the examination of the same witness, ^(u) to be settled by the master, ^(v) as where the title of the cause was mistaken in the commission, ^(w) *and where the in-³¹⁴terrogatories were leading, and the leading seemed to be by inadvertency.^(x)

If the solicitor acts as a commissioner, the depositions will be suppressed.^(y)

The depositions must be signed by the witness; and where a witness dies after examination, but before such examination is signed by him, the depositions cannot be made use of; but where the defendant, after publication, examined a witness, and on the usual affidavit obtained an order to re-examine this witness, but the witness died before a re-examination, the court permitted the defendant to make use of the former depositions of the same witness.^(z)

(s) Newl. Har. 207, 8.

(t) Sandford v. Remington, 2 Ves. jun. 189.

(u) Mendl v. Payne, 3 Austr. 923.

(v) Lord Arundel against Pitt, Ambl. 485.

(w) Robert v. Millicham, 1 Dick. 22.

(x) Spence v. Allen, 6 W. 180. Pres.

Ch. 403.; and see Sandford and Paul, 2 Dick. 780. and cases mentioned, lb. 754.

(y) Selwyn v. —, 2 Dick. 503.

(z) Copeland v. Stanton, 2 P. Wood. 414.

Depositions will be allowed to be read, though taken during an abatement of the suit. (z)

The clerks in court copy the depositions taken on commission, and the examiners copy depositions taken by them; (a) but no copy is delivered out, until publication passes by order of the court.

It has been doubted, whether depositions can be referred for impertinence. (b) For scandal, they certainly may. (c)

*315 The deposition of a witness may be amended **before* (d) or *after* publication, where a mistake has been made by the witness or the examiner; (e) and even after a decree, a re-examination by the master has been ordered in a case of mistake. (f)

Lord King observed, "it would be hard and unjust to pin a witness down to what is a mistake, by denying to rectify it." (g) In the case of Judge Fox, in the house of lords, (h) a witness, the day after he had given his evidence, was allowed to correct the statement he had made; but the chancellor, Lord Eldon, observed, "such restatement would be open to observation."

If a commission is necessary for the examination of witnesses who live *abroad*, a motion on notice may be made for that purpose, if accompanied with an affidavit as to the materiality of the witness. (i) The return-day of the commission will depend on where the witness lives.

The examination of witnesses *de bene esse* has already been considered. (k)

11. Motion for Examination of Defendant or Plaintiff as a Witness.

Unlike the practice of courts of law, a defendant may, in equity, previous to a decree, move as of course to examine a

*316 *codefendant*, **saving just exceptions* where he is such for *form*

(s) Thomson v. Tooke, 1 Dick. 115.

Peters v. Robinson, ib. 116.; and, see Drew v. Vernon, Cro. Car. p. 97.

(a) Frankland v. Frankland, 1 Dick. 231.

(b) Pynsent v. Pynsent, 3 Atk. 556.; but, see Nevel. Har. 295.

(c) 12 Ves. 201.

(d) Kirk v. Kirk, 13 Ves. 280. Rowley v. Ridley, 2 Dick. 677.

(e) Griells v. Gansell, 2 P. Wms.

646. Ingram v. Mitchell, 6 Ves. 290.

Darling v. Stanford, 1 Dick. 358.

(f) Sandford v. Paul, 3 Bro. C. C. 370, S. C. more full, 1 Ves. jun. 398.

(g) Griells v. Gansell, 2 P. Wms. p. 646.

(h) Dom. Proc. 22d June, 1805, M.E.

(i) 1 Bro. C. C. 448.

(k) Ante, p. 202. etc.

sake; (f) and not concerned in interest; (n) for otherwise a witness would probably be made a *defendant*, merely to deprive another party of his testimony; (n) If the answer of a defendant is replied to, he is considered as interested, and cannot be examined.

So, if a defendant examines witnesses, it will be considered that he is concerned *in interest*, unless it be collusively done. (o)

If a defendant is examined to matters wherein he is interested, he may *demur*. (p)

A defendant having been examined under the usual order as a witness, may have a decree against him upon other matters to which he was not examined. (q)

The depositions of a defendant examined without service of the order for liberty so to do, cannot be read; it being a surprise on the other party; (r) but, it seems, it is a motion of course to examine a defendant who is only a guardian *ad litem*, without an order for that purpose. (s)

A defendant may move to examine the plaintiff as a witness, saving all just exceptions, if the *plaintiff himself consents to *317 be examined; (t) and a plaintiff may, without the consent of the defendant, move to strike out of the bill any of the *coplaintiffs* names, whom he wishes to examine, on giving security for costs; (v)

So, if the evidence of a *coplaintiff* be necessary, and the defendant will not consent to his examination, the bill, on motion, may be amended, and such *coplaintiff* made a defendant, and

(f) Long v. Burton, 2 Atk. 218.

(m) Dixon v. Parker, 2 Ves. 222.

(n) Bellew v. Russell, 1 Ball and Beatty, 99. Franlyn v. Colquhoun, 16 Ves. 219. vid. Mayor and Aldermen of Colchester v. —, 1 P. Wms. 596. Fiddock v. Browne, 3 P. Wms. 238.

(o) Edmon v. Parker, 2 Ves. 224.

(p) Nightingale against Dodd, Ambl. 583.

(q) Ambl. 583.

(r) Mulvany v. Dillon, 2 Ball and Beatty, 413.

(s) Walker v. Thomas, 2 Dick. 781.

(t) Walker v. Wingfield, 15 Ves. 178.; and see Armiter and Swanton, Ambl. 393. Houghton v. Getty, 1 P. Wms. 569. in note. S. C. 1 Dick. 302. Mayor and Aldermen of Colchester v. —, 1 P. Wms. 506. and Hewson and Tooky, 2 Dick. 799. Motteux v. Mackreth, 2 Dick. 735.

(v) Witte v. Campbell, 12 Ves. 493. Lloyd v. Makeam, 6 Ves. 145.; and see Teppah v. Norman, 11 Ves. 563.; and vid. Motteux v. Mackreth, 1 Ves. jun. 142. and S. C. 2 Dick. 735.

the replication withdrawn, on the terms of amending the defendant's copy, and requiring no further answer. (w)

A complainant has been allowed, by consent, to be examined to prove a deed to which he was the only surviving witness. (x)

10. *Motion to enlarge Publication.*

Publication in a cause is the disclosing of the depositions and giving out copies of them, and this is done by the examiners or clerks in court, in pursuance of rules, or an order of court, or by consent of parties. A rule is first given to *produce witnesses*, which expires in eight days inclusive, and then a rule to *pass* *318 *publication*, which *also expires in eight days inclusive. The eight days in each of these rules must be days in term; and neither of them can be given unless entered in eight days before the expiration of the term. The rules may be entered by the defendant, if the plaintiff neglects to give them, for one term. (y)

If, however, previously to publication, it appears that there may be occasion for farther testimony, and it cannot be had without danger of injustice to other parties, the course is to allow the publication to be enlarged upon affidavit; (z) but the court will not *enlarge publication* without a *special case* made. (s)

The party's want of knowledge of the rules of proceeding, or want of attention in his solicitor, are not sufficient. In all cases the affidavit must be express, that the party, his clerk in court, and solicitor, have not seen, or been informed of, and that they will not see, and be informed of, the contents of the depositions, until the enlarged time of publication. (b)

In these cases the other party may not only cross examine, but examine at large. (c)

It has been said, that there is not in equity any power of *cross examination*; (d) but that is not quite correct; a cross examination is allowed on the examination of the witness; or *319 if a cross examination *is afterwards found necessary, a motion for that purpose, to enlarge publication, may be made, and the witness cross examined.

(w) *Mottaux v. Mackreth*, 1 Ves. jun. 142.

(x) *Whately v. Smith*, 3 Dick. 690.

(y) 1 Turn. and Ven. 91.

(z) *Whitelocke v. Baker*, 13 Ves. 2.

512; and see *Anon.*, 1 Vern. 253.

(a) 13 Ves. 512.

(b) *Ibi.*

(c) 2 Vern. 253.

(d) *Wid. Pickering v. Lord Stamford*,

2 Ves. jun. 584.

If a cross examination as to the execution of deeds be necessary, the court will, on motion, make an order in the alternative, that either the examiner in whose hands the deeds are should cross examine, or that they should be delivered over to the defendant's examiner for that purpose.(c)

If a cross bill is filed after an answer has been put in to an original bill, a motion may be made to stay publication, until an answer is put in to the cross bill.(d) but it is not a motion of course.(e)

And where a motion was made after rules for passing publication had issued, that the publication in the original cause might be enlarged until a fortnight after an answer to the cross bill, the motion was refused with costs, no special case being made by affidavit.(f)

Where either material conversation or an admission of the defendant occurs after answer, or replication or examination of witnesses, or if a new fact happens after publication, which is material to have before the court in evidence, when the original cause is heard, a *special application* should be made for the opportunity of examining, and *that the depositions may be read at the hearing: if a discovery is required, the party should file a bill for that purpose merely, and if relief is required, that the answer comprehending the discovery should be read at the hearing of the original cause.(g) A *supplemental bill* in such cases is improper, and would be liable to demurrer. *320

12. Motion for examination of Witnesses after Publication.

If a witness is *interested*; and that fact is known previous to the examination, a general interrogatory should be framed, requiring him on his cross examination to answer, whether or no he is interested;(h) and if he untruly denies that he is interested, the party affected by his evidence may discredit the witness, by examining other witnesses as to the truth of the proposition he has sworn.

(c) *Turner v. Burleigh*, 17 Ves. 354. 133.; and see *Aylet v. Easy*, 2 Ves. 336.

(d) *Ramkissensent v. Barker*, 1 Atk. 20. (g) *Milner v. Lord Harewood*, 17 Ves. 148.

(e) *Dalton v. Carr*, 16 Ves. 93. (h) *Purcell v. Macnamara*, 8 Ves.

(f) *Cook v. Broomhead*, 16 Ves. 326.

If evidence as to credit be taken in the examination in chief, a motion may be made to refer the interrogatories to the master on the ground of impertinence; (i) but after publication has passed, the court will, upon articles left with the examiner, or in the six clerk's office, when the deposition is taken by commissioners, (k) do a special motion, (l) give the party liberty to examine witnesses by general interrogatories, as to the credit of the witness, and in contradiction of such facts sworn to by the witness, as are not material to what is in issue in the cause; for witnesses in that stage of the suit are not permitted to be brought to vary the case in evidence, by testimony that relates to the matter in issue, under the pretence of examining to credit only. (m) Indeed, if such evidence were allowed, there might be no end of suits. Additional interrogatories to the credit or competency of a witness, or to prove exhibits, or to cross examine witnesses, are allowable; but not to examine any new witness. (n) A person, however, is not allowed to discredit his own witness. (o)

Though at law you can examine only to the general credit of a witness, it appears to be otherwise in equity, for there, particular charges must be stated. (p)

*322 After publication and a cause is set down, it is too late to examine to credit. (q)

Lord Hardwicke has observed, that no commission was ever granted into foreign parts, to examine as to the credit of a witness, (and Ireland, he said, though belonging to the dominions

(i) Mill v. Mill, 12 Ves. 406.

(k) Newl. Harr. 283.

(l) In Wood and Hamerton, 9 Ves. 145. the motion was supported by affidavit; but this seems not to have been the case in Purcell and Macnamara, 8 Ves. 324. In Russell and Atkinson, 2 Dick. Rep. 532. it is considered as a motion of course, and that it need not be specially moved for on affidavit; but that if the party staid a considerable time after publication, and did it merely for delay, it might be a ground to discharge the order. According to the 72d order of Lord Chancellor Bacon, "No examination is to be had of the credit of

any witness but by special order, which is sparingly to be granted." 4 vol. Bacon's works, folio edition, p. 153.; and such seems now the practice; see Mill v. Mill, 12 Ves. 406.

(m) See Callaghan v. Rochfort, 3 Atk. 643. Barnsley v. Powell, 3 Atk. 594. Sanford v. —, 1 Ves. jun. 399. Wood and Hamerton, 9 Ves. 145. Purcell v. Macnamara, 8 Ves. 326. and Carlos and Brooke, 10 Ves. 49. White v. Fussell, 18 Ves. 153.

(n) Barnsley v. Powell, 3 Atk. 594.

(o) Purcell v. Macnamara, 8 Ves. 327.

(p) Gill v. Watson, 3 Atk. 522.

(q) Ib. 522.

of the crown of Great Britain, with respect to the jurisdiction of the court is considered as a foreign part,) because this would introduce a certain method of delay; and if it was ever to be granted upon great necessity, and in a case of consequence, the only ground of it must be, that no person in England could swear any thing as to the witness's credit.(r) In general, says Lord Hardwicke, it is not allowable to examine to the competency of a witness, after publication; because this might have been objected to, and inquired into upon the examination.(s) And Lord Eldon, in such a case, thought it was the fault of the party complaining, for there may be a general interrogatory to every witness, whether he has any interest;(t) but Lord Hardwicke was of opinion it might be reasonable to allow an examination to competency even *after publication*, where the objection to the competency arose from a matter that came to the knowledge of the party *after the examination*; and that the proper way of proceeding in such case would be, by a motion for leave to examine to this matter upon a foundation of ignorance at the *time of the examination.(v) Mr. Justice Powell observed, as *323 to the objection, that, after publication, you may examine as to the credibility, but not as to the competency of a witness, it was a difference without colour of reason; for, says he, if you may examine to the credibility which goes to part, you may certainly examine to the competency which goes to the whole, and totally destroys his evidence.(w)

In a more modern case,(x) a witness had been examined, and afterwards there were suspicions that he was interested, either personally, or as a trustee; and upon this, his honour directed an issue, in order that, upon his examination in the court of law, questions might be put to him to discover his interest; though he said he thought the court might order an interrogatory to be exhibited to him, in the nature of a *voir dire*.

If a person *interested* in a suit is examined, and is not objected to at the time of his examination, yet if, on reading his depo-

(r) Callaghan and Rochfort, 3 Atk. 643.

(v) See Callaghan and Rochfort, 3 Atk. 643.

(s) Ibid.

(w) See Needham and Smith, 2 Vern.

(t) Purcell and Macnamara, 8 Ves.

463.

326. See also what is said in Sanford v. —, 1 Ves. jun. 399.

(x) Stokes v. McKerrall, 2 Bro. C. C. 379.

either at the hearing of the cause, it appears, on the face of such deposition, that he is an interested witness, the court will suppress the deposition. This is frequently the case in tithe causes, where it often happens that the witness, on the face of his deposition, appears to be an owner of lands subject to the tithes, respecting which question is made, and in such case, *324 though the evidence was not objected *to at the time when it was taken, yet the deposition is uniformly suppressed.(y)

Where, however, a witness was examined before the decree, and had given evidence in consequence of a release, which, by mere accident, did not cover a very small debt due to him, in respect of which he was interested at the hearing, and, therefore, incompetent, a motion was allowed, after the decree, to re-examine him by interrogatories, as a witness in the cause. It was contended the interrogatories should be settled by the master; but this was thought not to be consonant with the practice, and was not ordered. Lord Taurlow said, in his determination of this case, that if he had any reason to suspect, that, by any other thing than a slip, they had so examined him, he would not allow another examination; for, if they had managed it in that way, the least they ought to lose would be, the benefit of that examination.(z)

If a man is examined as a witness, and is at his examination disinterested, but afterwards becomes interested, and plaintiff in the cause, his depositions may be read.(a)

It has been held, that, if an interested witness is cross examined, this makes him a good witness, though, otherwise, he would not.(b)

*325 The court has allowed the defendant after *publication to prove an old paper found in a parish registry.(c)

11. Motion to prove Exhibits *visa voce* at the Hearing.

The execution of deeds, and the handwriting of letters, or signature thereto, as to accounts, &c. &c. may be proved *visa voce* at the hearing of the cause, an order, on motion or petition,

(y) Vid. Gwillim's Tithe Cases, p. 2956; and see Eq. Cas. Abr. Bank of England, 2 Ves. 42. Haws v. Hand, 2 Atk. 615.

(z) Sanford v. —, 1 Ves. jun. 398.

(b) Corporation of Sutton Colefield v.

— (a) Goss v. Tracey, 1 P. Wms. 268.

Wilson, 1 Vern. 254.

S. C. 2 Vern. 609.; and see Glynn v.

(c) Clarke v. Jennings, 1 Anstr. 173.

being first obtained for that purpose. The order must describe the deeds by their dates; and parties' names; and letters by their dates, and from or to whom; and other matters intended to be proved must have a proper description. Office copies of judgments, enrolment of deeds, and various other instruments, may be thus proved, and read at the hearing; but a will cannot, (d) the witnesses to which must be examined on interrogatories, the adverse party having a right to cross examine the witnesses as to the sanity of the testator, the manner of execution of the will, &c. &c. (e)

A subpoena may be obtained to enforce the attendance of witnesses to prove a deed, &c. *vis a voce*, at the hearing of a cause. (f)

Exhibits proved *vis a voce* at the hearing, are *allowed only *326 where the application is by the party who is to make use of the exhibits, but is never allowed on the application of the contrary party. (g)

It is a rule in regard to exhibits, that you can only prove the handwriting of the person to that exhibit, or the handwriting of the witness; but cannot enter into any examination whatever, that will admit of a cross examination; (h) but the court will examine *vis a voce* upon the suggestion of any question as to an exhibit. (i)

If a cause be adjourned, liberty will, on motion, be granted to examine, to prove a witness to a deed material in the cause, being in Scotland, in order to prove the handwriting of the witness. (k)

In the *exchequer*, where an infant is a party, and his interest is concerned, the court does not allow of an order to examine a witness *vis a voce* to prove a deed or exhibit; but the witness must be examined in the office, upon interrogatories. (l)

Cross Bill.

A cross bill may be filed before or after an answer has been

(d) *Harris v. Ingledew*, 3 P. Wms. 23.; and see 1 Atk. 488. (i) *Turner v. Burleigh*, 17 Ves. 355.; and see *Bank against Farquhar*, Amb. 145.

(e) 1 Turn. and Ves. 91, 2.

(f) *Newl. Harr.* 282.

(g) *Graves v. Budgett*, 1 Atk. 445.

(h) *Earl of Pomfret v. Lord Windsor*, 2 Ves. 470, 80.; and see *Graves v. Budgett*, 1 Atk. 445.

(k) *Amb.* 145.

(l) *Carleton v. Brightwell*, 2 P. Wms. 463.

put in to the original bill, or before a decree; (a) but the original bill must be answered, before an answer can be insisted on to the cross bill. If, however, the plaintiff, after the cross bill filed, amends his bill, he loses his priority. (b)

What is termed a cross bill, is a bill brought by a defendant to a former bill which is depending against the plaintiff in such bill, or the parties thereto, touching the matter of the bill, or the facts set forth in the defendant's answer to such bill. It is generally used as a defence, and for the discovery of facts, in the defendant's knowledge, which may assist the defence in the first cause; (c) and publication in the original bill will be stayed until after an answer to the cross bill. (d)

If a bill be filed for the specific performance of an agreement, a cross bill will lie to have the agreement delivered up or cancelled. If, however, a person in possession files a bill for a conveyance, and a cross bill is brought to have the possession delivered up, though the bill in the first cause is dismissed, yet the plaintiff in the cross cause cannot succeed, his being a legal claim, enforceable by ejectment. (e)

If a defendant to a bill for a specific performance proves an agreement different from that insisted on by the plaintiff, he may have a decree upon his answer, submitting to perform the agreement; (f) formerly, a cross bill was necessary, but now it would be dismissed as unnecessary.

A cross bill may be filed to answer the purpose of a *plea puis darrein continuance*, at the common law: as where, after replication and issue joined, a release has been obtained; in such case, by a cross bill, the release may be put in issue. (g)

Bills of this description must be filed before publication has past on the first bill; unless the plaintiff in the cross cause is content to go to a hearing upon the depositions already published; or the bill be filed by the direction of the court. (h)

(a) 2 Eq. Abr. 177.

(b) Steward v. Rowe, 2 P. Wms. 435. Long v. Burton, 2 Atk. 218. Rat-tray v. Darley, 3 Atk. 724.

(c) 1 Vol. Har. Ch. p. 166. and Mitford's Plead. p. 7.

(d) Gardiner v. Mason, 4 Bro. C. C.

478. Anderson v. Lewis, 2 Bro. C. C. 429.; and see 1 Atk. 21.

(e) 1 Ves. jun. 113.

(f) *Wife v. Clayton*, 13 Ves. 546.;

and see 15 Ves. 525.

(g) Mitford's Plead. 76.

(h) Mitf. Plead. 77. 3 Atk. 110.

In a *cross cause*, service of process upon the clerk in court of the defendant is good service. *(l)*

Evidence in the *cross cause* concerning the matters in issue in the original cause, is not allowed to be read after a decree in that cause; but such depositions may be read as do not relate to the matters in issue in the original cause. *(m)*

Where neither party examines witnesses in the original cause, the depositions of witnesses examined to the same matters put in issue by that cause, may be read at the hearing of the *cross cause*. *(n)*

If the original cause is heard before the *cross* *cause, the decree in the original cause may afterwards be varied by the decree in the *cross cause*, provided the *cross bill* was filed before the decree in the original cause. *(o)*

The court will not delay the original cause on account of the *cross bill*, without something to warrant it, so that the plaintiff in the original often happens to get a decree; but the plaintiff in the *cross bill* may, by *caveat*, stop the enrolment for forty days, and then petition to rehear and bring on both together. *(p)*

If a *cross bill* is filed to have a usurious security delivered up, without offering to pay the sum really due, a demurrer will lie. *(q)*

If an agreement is sought to be set aside as unconscionable, and without proper consideration, a *cross bill* is usually filed to establish the agreement, and for a specific performance. *(r)*

A party cannot, by a *cross bill*, question what is admitted by the answer to the original bill. *(s)*

If a bill be filed by impropriators for the recovery of tithe, and the answer denies the title as impropriator, a *cross bill* may be filed to obtain a discovery of the title of the plaintiffs in the original bill, and a production of title deeds, &c., and a discovery of the title to the particular *tithe claimed, and whether the *330

(l) Gardiner v. Mason, 4 Bro. C. C. 478.

(p) Kinsey v. Kinsey, 2 Ves. 577.

(q) Mason v. Gardiner, 4 Bro. C. C.

(m) Wilford v. Braxley, 3 Atk. 502.

438.

See Paterson v. Slaughter, Amb. 293.

(r) See Barnardiston v. Lingard, 2

(n) 3 Atk. 502.

Atk. 133.

(o) Hicks and Coopers, Vin. Abr. tit. Decree (D.) Ca. 14.

(s) Berkely v. Ryder, 2 Ves. 537.

former occupiers of the land had ever paid that species of tithe.(t)

Where a plaintiff brings his bill praying an account against a person, and allowances in that account, the defendant is as proper to make objections, as if a cross bill had been brought.(u)

If, upon the hearing of a cause, a cross bill appears necessary, to a complete determination of the suit, the court will direct it.(v)

Evidence.

We shall now make some general observations on evidence.

The examination of witnesses is not *viva voce*, as at law, but proceeds by *depositions* in writing, and bears, in this respect, a resemblance to the course of the civil and canon law.(w) This mode of investigating truth has not the advantages derivable from a *viva voce* examination.(x) If, however, in this manner the truth is not so likely to be elicited from an unwilling witness, yet, on the other hand, a witness is not liable to be goaded or cajoled into a perversion of the truth by a dexterous advocate. For a rogue, a *viva voce* examination is the best; but for an honest man, depositions coolly and deliberately made,
 *331 *seem preferable. Courts of equity have jurisdiction only in matters relating to *property*: the life, the liberty, and the reputation of individuals, can only come in question in courts of law; and as to these, the constitution has wisely provided, that persons shall have the benefit of a public oral examination of witnesses, and the inestimable advantage of a trial by jury.

The chancellor, indeed, has a right to examine witnesses *viva voce*;(y) and it has been often done *after publication*, where doubts have appeared in their depositions, and the examination has been to clear such doubts, and inform the conscience of the court;(z) but this is allowed sparingly,(a) and there never was a case where witnesses have been examined *at large* at the hearing, though the court will examine *viva voce* upon the suggestion of any question as to an *exhibit*.(b)

(t) *Bowman v. Lygon*, 1 Anstr. 1.

(u) *Ayliffe v. Murray*, 2 Atk. 89.

(v) See on this subject, *Mitt. Plead.*

77.

(w) *Graves v. Badgell*, 1 Atk. 445.

(x) See what is said in *Binford v. Dommett*, 4 Ves. 762.

(y) *Turner v. Barleigh*, 17 Ves. 364.

(z) *Bishop v. Church*, 2 Ves. 180.

(a) *Graves v. Badgell*, 1 Atk. 445.

(b) 17 Ves. 365.

The competency of the court to administer an oath *vis voce*, is illustrated in the case of *Aylet*, who, having perjured himself on a *viva voce* examination, was prosecuted for and found guilty of perjury; and this case was carried to the house of lords, and the objection that the chancellor had no power to administer an oath, was principally, but unsuccessfully insisted on. (c)

It has been said that the rules as to evidence *are the same *332 in equity as at law. (a) It is so as to matters of *fact*, (b) and is the same as to *witnesses*. If, for instance, a witness is dead who has attested a deed, it is not sufficient that you prove the handwriting, but you must likewise show that he is dead, (c) more particularly where an attesting witness has lived abroad. (d)

But it is not exactly true, that with the single exception of the rule, that a decree cannot be obtained upon the evidence of one witness against the positive averment of the answer, *the rules of evidence in equity and at law are not different*.

At law, no defendant can be examined as a witness; but in equity a person made a defendant for *form sake*, may be examined in a cause, saving just exceptions. (e) So, a trustee, though merely nominal in every other respect, cannot be examined at law, as to the merits or intention of a deed, but he may be a witness in equity. (f) So, in a case of fraud, the evidence of a person who joined in granting away her estate has been admitted, though it invalidated her right to the estate.

The rules of evidence at law and in equity, Lord *Hardwicke* observes, do not differ in general, but only in particular cases, where *fraud* *is charged by a bill, or in cases of *trusts*, as to *333 which courts of equity do not confine themselves within such strict rules as they do at law, but, for the sake of justice and equity, will enter into the merits of the case in order to come at fraud, or to know the true and real intention of a trust or use declared under deeds.

So, though an administration is not taken out till after the filing of the bill, yet, if procured before a cause comes to a hear-

(a) See *Moore and Aylet*, 2 Dick. 641.

(d) *Manning v. Lechinere*, 1 Atk. 453. and said Arg*. In *Lady Ormond v. Hutchinson*, 13 Ves. 50.

(b) *Glyn v. Bank of England*, 2 Ves. 381.

(e) *Henley v. Phillips*, 2 Atk. 48.

(d) *Ib.*

(e) *Man v. Ward*, 2 Atk. 229.

(f) *Ib.* 229.

ing, in equity, it is sufficient; but it is otherwise at law, because there the defendant may craveoyer of the letters of administration.(g)

So, an answer to a mere bill of discovery cannot be read as evidence in chancery, though it may at law.(h)

There are many cases, also, in which the court, giving an account, directs it to be taken with the admission of certain documents, or testimonies, not having the character of legal testimony.(i)

Though what is evidence in a court of law is in general evidence in equity, yet there is evidence used in a court of equity, which, from the subject to which it is applied, never can be called for, or brought forward in a court of common law, and which by way of distinction may be termed *equity evidence*; and in *334 respect of which, all the general treatises of evidence are silent. Of this description is the evidence which may be adduced to reform a settlement, to show a mistake, in cases of account, in cases of fraud, and in regard to the specific performance of agreements and trusts.

In the preceding parts of this work we have incidentally treated of this species of evidence, and a repetition is unnecessary. A collection of the rules laid down as to evidence in courts of law is beside the plan of this work, so that a few detached remarks on the subject is all that, in this place, seems to be required.

The evidence must apply to the facts put in issue, and if the depositions are as to a fact *not in issue*, they will not be permitted to be read.(k) On the same ground, no notice will be taken of evidence, by which it is attempted to introduce a defence totally different from that made by the answer.(l)

Under *general charges* in a bill, as that a man is *insane*, or addicted to *drinking*,(m) or that a woman was of *lewd fame*,(n) or behaved in an *indecent manner*,(o) particular evidence in support of the general charge may be given; but under a general charge

(g) *Fell v. Lutwidge*, 2 Atk. 120.

(h) *Butterworth v. Bailey*, 15 Ves.

362. *Sed Vid.* 13 Ves. 47.

(i) *Lupton v. White*, 15 Ves. 443.

(k) *Clarke v. Turton*, 11 Ves. 240.

Whaley v. Norton, 1 Vern. 484.; but

see contra, *Hodgson v. Thornton*, Eq. Ca. Abr. 228.

(j) *Smith v. Clarke*, 12 Ves. 480.

(m) *Clarke v. Perum*, 2 Atk. 340.

(n) *Ib.* 337. etc.

(o) *Watkins v. Watkins*, 2 Atk. 27.

that a wife had *misbehaved herself*; particular evidence to prove *adultery* was not allowed. (p)

*In general, it is true, that what the defendant *believes* the court believes; but a will not proved or admitted by the heir at law, cannot be established, if the defendant says, only, he *believes* a will was made. (q)

If on a bill to establish a will, the heir at law admits the will, and dies before the cause is brought to a hearing, and by bill of revivor an infant heir is made a defendant, and the suit revived, the bill must be proved *per testes*, against such infant heir. (r)

The probate of a will is not conclusive evidence as to the effect of a codicil; it being refused only in a very plain case. (s)

If a will be made in *French*, and the probate is in *English*, and varies from the original, the probate being in a different language, is not conclusive. (t)

Where a plaintiff makes a claim under a will, and the defendant in his answer admits the will, but refers to it for greater certainty, the will may be read from the bill, where nothing turns upon the construction of it. (u)

Where the answer to a bill for *discovery only* is used as evidence, the *whole* must be read; and where *relief* is prayed, and the answer replied to, the plaintiff reading admissions must proceed to the completion of the immediate subject to which the defendant is answering, according to the course of evidence at law; but this does not apply to distinct matter. (z)

The answer of an administrator to a creditor's bill, stating that he *believes* the debt is due, is not, it seems, a sufficient foundation for a decree, without further evidence.

If an answer be not *replied to*, it is, as before observed, (a) considered as *true*. (b)

It seems, that if the answer be read, and it is insisted that there is a *mistake* in the office copy, the original answer will be sent for, from off the file. (c)

(p) *Sidney v. Sidney*, 2 Atk. 338.

S. C. 3 P. Wms. 269.

(q) *Potter v. Potter*, 1 Ves. 274. See *vid. 1 Ventris*, 361.

(r) *Sleeman v. Sleeman*, 2 Dick. 787.

(s) *Sinclair v. Hone*, 6 Ves. 607.

(t) *L'Fit v. L'Batt*, 1 P. Wms. 526.

(u) *Owen and Jones*, 2 Anstr. 505.

(z) *Lady Ormond v. Hutchinson*, 13

Ves. p. 47.

(a) *Ante*.

(b) *Wright against Nutt*, 3 Bro. 340.

(c) *Countess of Gainsborough v. Gif-*

ford, 2 P. Wms. 425.

Codefendants may read any thing proved on the part of the plaintiff, because that is proof examined to against all the defendants.(d)

The *answer* of a defendant, though evidence against himself, is not evidence against another defendant, since, in such case, there is no opportunity for cross examination;(e) but where one defendant said by his answer, that he was much in years, and could not remember the matter charged in the bill, but that J. S. was his attorney, and transacted this matter, and J. S. was made a defendant, his answer, thus referred to, was admitted to be read against the codefendant.(f) *And the answer of a defendant not brought to bearing, has been read as evidence against another defendant at the hearing.(g)

Where a defendant disclaims all right, his evidence cannot be read as a proof of a plaintiff's right, to the prejudice of another defendant.(h)

So, if a defendant may by possibility be liable to costs, his evidence is not admissible in favour of a codefendant;(i) especially if he is also a trustee.(k)

The evidence of bond creditors of the testator is not admissible to obtain a decree for payment of a legacy, as they must be preferred to legatees.(l)

The office copy of a bill cannot be read in evidence, if the original is not upon the file, though an officer of the court is ready to prove that the original cannot be found among the records.

If the defendant refuses to produce the *office copy* of the bill, the *draft* of the bill cannot be read, but the record must be inspected.(m)

A decree at *Leghorn* has been allowed to be read as evidence, and the court will not overrule what was so determined.(n)

(d) *Walker v. Froswick*, 2 Ves. 623.

Eade v. Lingood, 1 Atk. 204; but see 2 Bro. C. C. 204.

(e) *Morse and Royal*, 12 Ves. 355.

Jones v. Tuberville, 2 Ves. jun. 11.

(k) *Twining v. Morrice*, 2 Bro. C. C. 330.

Askew v. Poulterers' Company, 2 Ves. 90.

(l) *Jones v. Tuberville*, 2 Ves. jun. 11.

(f) *Anon.* 1 P. Wms. 300.

(g) *Pitt v. Wilks*, 1 Dick. 24.

(m) *Huddleston v. Briscoe*, 11 Ves. 583.

(h) *Hill v. Adams*, 2 Atk. 39.

(i) *Barrett v. Gore*, 3 Atk. 401.

(n) *Burrows v. Tameau*, 1 Dick.

An order to read in one cause the bill, answer, and the rest of the proceedings in another cause, *is good, where it is between *338 the same parties; but such order cannot be extended to a third person who was no party to the first.(o)

Depositions taken in a former cause cannot be read in another cause against one who does not claim under the party against whom those depositions were read. But if a legatee brings a bill against the executor, and proves assets, another legatee, though no party, may have the benefit of those depositions.(p)

A demurrer to a bill, on the ground that the discovery sought may criminate the defendant, is not to be construed as an admission of the allegations in the bill, or as disqualifying a witness.(q)

If a defendant positively, plainly, and precisely, denies an assertion in the bill, and one witness only proves it as positively, clearly, and precisely, as it is denied, no decree for relief can be made.(r) But if there is one circumstance, attaching more credit to the evidence of the witness, and overbalancing the credit due to the denial, as a positive denial, by the defendant, a court of equity will act upon the testimony of one witness.(s) And where the court, from circumstances, attaches *more credit *339 to the testimony of the witness, than to the denial of the defendant, the court, it seems, will, if the defendant is bold enough to require it, direct an issue, and order that the defendant be examined,(t) or that the defendant's answer be read at law, not as evidence, for that could not be, but so as the defendant might have the benefit of his oath at law, if it would weigh any thing with the jury.(u)

Where, however, the plaintiff examines only one witness to

48. S. C. Select Cases in Ch. 49. and 2 Str. 733. and Mosely. Atk. 149. Evans and Bicknell, 6 Ves. 184, and Piliq v. Armitage, 12 Ves. 80.

(p) Eade v. Lingood, 1 Atk. 203. East-India Company v. Donald, 9 Ves. 282, etc. Mortimer v. Orchard, 2 Ves. 244.

(q) Coke v. Fountain, 1 Vern. 413. See Lloyd and Pasingham, 16 Ves. 64. 69. (r) See East-India Company v. Donald, 9 Ves. 284. Rembar v. Matham, 1 Bro. C. C. 52.

(s) Wakelin v. Walthall, 2 Ch. Ca. 8. Alam v. Jourdan, 1 Ves. 181.; and see Le Neve v. Le Neve, 3 Atk. 340. 3 Atk. 270. (t) Only v. Walkers, 3 Atk. 498.

(u) Glyn v. Bank of England, 1 Ves. 42. 46. between v. Rhodop, 2 Vern. 564.

(p) See Walker v. Hobbs, 3 Atk. 69.; and see Sir Thos. Janson v. Roney, 2

establish a fact denied by the answer, the court will lay stress upon the evidence, so far as it serves to explain *any collateral circumstance.*(v)

If a piece of evidence, before it is produced, must be stamped, it may be stamped during the hearing of the cause,(w) or the cause will be allowed to *stand over* for that purpose.(x)

Quære. If a stamped original be lost a copy can be stamped.(y)

So, a cause is allowed to stand over to procure an *administration*, but not for the purpose of enrolling a memorial.(z)

*340 *It is too late at the hearing of the cause to object to depositions taken *de bene esse*, as irregular; but, in such case, the court ought to have been moved to discharge the order of publication.(a)

Though an attorney or counsel concerned for one of the parties may, if he pleases, demur to his being examined as a witness; yet, if he consents, the court will not refuse the reading his depositions.(b)

Declarations of a party to a deed, previous to the execution, are admissible in support of the deed against imputations of fraud; but declarations subsequent to the deed, impeaching the same, are inadmissible.(c)

If a person has not been heard of for *twenty-three* years,(d) or even *fourteen*,(e) he will be taken to be dead; but *five* or *six* years, it seems, would not be sufficient to raise the presumption.(f)

An annuity not claimed for a great length of time will be presumed to be satisfied.(g)

A legacy will after a length of time, *forty-four*,(h) or *forty*

(v) Anon. 3 Atk. 270.

(b) Maddox v. Maddox, 1 Ves. 63.

(w) Ford against Compton, 2 Bro. C.

Bishop of Winchester v. Fournier, 2 Ves. 445.

C. 32. Coles v. Trecothick, 9 Ves. 252.

S. C. 1 Smith, 238. Davidson v. Foley,

(c) Conolly v. Lord Howe, 5 Ves. 700.

3 Bro. C. C. 604.

(x) Huddleston v. Briscoe, 11 Ves.

(d) Webster v. Birchmore, 13 Ves. 362.

593. 595.

(y) See Ford against Compton, 2

(e) Lee v. Willock, 6 Ves. 605.

Bro. C. C. 32.

(f) 13 Ves. 362.

(z) Davidson v. Foley, 3 Bro. C. C.

(g) Smallman v. Lord Arch. Hamilton, 2 Atk. 71.

604.

(a) Dean and Chapter of Ely v.

(h) Fetherby v. Hartridge, 2 Vern.

Warren, 2 Atk. 189.

20.

years, for instance,(i) or a much less period, twenty-five years,(k) be presumed to have been *paid; but all the cases, it is said, *341 where that presumption has been admitted, have contained circumstances from which the presumption might arise.(l)

Where a party had not been heard of for twenty years, payment has been ordered, upon a recognisance to refund in the event of a claim.(m)

In the case of witnesses called to impeach wills they have attested, Lord *Mansfield* said he would hear those witnesses, but would give no credit to them, and Lord *Kenyon* followed him in that. Lord *Eldon* took a middle course, and admitted such witnesses to be heard, and their credit duly examined, but with all that jealousy attaching to a man who, upon his oath, asserts that to be false which he has, by his solemn act, attested as true.(n)

It is said that when a man is charged only by an oath or a book, the same evidence will be allowed in his discharge.(o)

It seems, however, that the case of *Hamard* and *Brown* was the first case where, because a man had charged himself by answer, his answer should be allowed as a good discharge, and the court said it *ought to be the last*.(p)

Where an account is of twenty years' standing, *the defendant *342 may prove on oath what he cannot prove by books and cancelled bonds.(q) So, an account of fourteen years' standing may be proved by an oath.(r)

A plaintiff will not be allowed to charge any thing upon his oath;(s) but a defendant may discharge himself by his oath in respect of sums under forty shillings,(t) so as the whole is not more than 100*l.*; (an unreasonable rule, it has been called;)(u)

(i) *Jones v. Tuberville*, 2 Ves. jun. 11. S. C. 4 Bro. C. C. 115.

(k) *Dixon v. Dixon*, 4 Bro. C. C. 510.

(l) *Cooper against Thornton*, 3 Bro. C. C. 96.

(m) *Bailey v. Hammond*, 7 Ves. 590.

(n) *Howard v. Braithwaite*, 1 Ves. and Bea. p. 203.

(o) *Darston and Earl of Oxford*, 1 Eq. Abr. 10.

(p) 2 Vern. 194.

(q) *Peyton v. Green*, 1 Ch. Rep. 148. S. C. 1 Eq. Abr. 11.

(r) 1 Ch. Cas. 127. S. C. 1 Eq. Abr. 11.

(s) *Marshfield v. Weston*, 2 Vern. 176.; and see 2 Eq. Abr. p. 8. in marg. note b.

(t) 2 Ch. Cas. 249. S. C. 1 Eq. Abr. 11. 2 Vern. 176. 2 Freem. 136.

(u) *Whicherly v. Whicherly*, 1 Vern. 478.

but he must in his affidavit swear positively, (v) and mention unto whom paid, for what, and when. (w)

As to evidence before the master, and on appeals, we shall afterwards observe.

The evidence of a *prochein amy* cannot be read, as he is liable to costs. (x) Nor can the deposition of the wife of a *prochein amy* be read, the husband being liable to costs. (y)

A trustee, though he has the legal estate, is considered as having no interest at all in this court, and is examined by orders every day (z) but a person who is *executor in trust*, or *ad-
343 ministrator in trust, has been determined not to be capable of being examined.

An administrator *durante minore etate* is, in general, a competent witness after the administration is determined. (a)

Where a person has an interest, it is not sufficient for him that he has been satisfied; he must produce a release, or his evidence cannot be read. (b)

Parishioners are not good evidence to prove a charity given to the parish: *scous* if only a lodger, and one that does not pay to the poor. But the witness will be supposed to be a house-keeper, and to pay to the poor, unless the contrary is proved. (c)

Setting down the Cause.

The rule to pass publication being expired, the cause may be set down to be heard the next term after publication passes; and if the plaintiff neglects it, the defendant may, the term after, set down the cause, in order to recover his costs (d) and if it be an injunction cause, the defendant may set down the same the term after publication. (e) If publication has been enlarged at the instance of the defendant, upon the terms of not

(v) Robinson v. Cumming, 2 Atk. 410. 1 Ball and Beatty, 413. and the principal case.

(w) Anon. 1 Vern. 283.

(a) 3 Atk. 604.

(x) Head v. Head, 3 Atk. 511.

(b) Anon. 2 Atk. 14.

(y) G. C. 3 Atk. 547.

(c) Attorney General v. Wyburgh, 1

(z) Croft v. Pyke, 3 P. Wms. 101.

P. Wms. 590.

Mabank v. Motcalké, 3 Atk. 95.

(d) See Countess of Gainsborough v.

Fotherby v. Fate, 3 Atk. 604.; and see Bel-

Giffard, 2 P. Wms. 424.

law v. Russell, 1 Ball and Beatty, 90.

(e) Vid. Mar. Ch. Pract. Newl. Ed.

and case there mentioned. Floyd and

p. 302.

Powis, mentioned in Mulvany v. Dillon,

hindering the plaintiff from setting down the cause, the same may be set down before publication has passed: (p)

A cause cannot be set down to be heard in the same term in which the rule to pass publication is given, unless by the consent of all parties: (q)

Subpoena to hear Judgment.

When the cause is set down, the next step is to obtain a subpoena to hear judgment, which is always made returnable three days before the day on which the cause is to be heard, exclusive of a Sunday, and is served as other subpoenas are. If the defendants live in town, or within twenty miles, they must be served ten days at least before the time mentioned in the writ to hear judgment, except it be in the vacation between Easter and Trinity terms, in which case eight days are sufficient. If the defendants reside above twenty miles from London, the service must be fourteen before the time to hear judgment, except in the before-mentioned vacation, and then ten days only: (r)

When a plaintiff seeks relief not merely against a husband, seized or entitled in right of his wife, but against the separate estate of the wife, she must be served with a subpoena to hear judgment: (s)

Where an infant is defendant, the service of the subpoena to hear judgment must be on the guardian, and not on the infant: (t)

If the clerk in court of the defendant cannot be found, the court, on a motion for that purpose, will permit the subpoena to hear judgment to be served on the person who acted as solicitor for one of the defendants, together with a copy of the order, with some person in the house which was the defendant's last place of abode: (u)

If the plaintiff sets down a cause, and does not serve the defendant with a subpoena to hear judgment, but he attends, and the plaintiff does not proceed in having the cause heard, the same is struck out of the paper, and no costs are given on either

(p) *Yale v. Bolland*, 1 Dick. 488.

(q) 3 Term. and Ven. 52. in note 7.

(r) 1 Term. and Ven. 94.

(s) *Jones and Harris*, 2 Ves. 426.

(t) *Taylor v. Atwood*, 2 F. Wms. 643.

(u) *Anon.* 1 Ves. 23.

side; but if the plaintiff serves the defendant with a subpoena to hear judgment, and the defendant makes and files an affidavit of such service, and the cause is in the paper, and the plaintiff's counsel does not open the bill, in such case, upon reading the defendant's affidavit of the service, the court will dismiss the plaintiff's bill with costs, to be taxed. (v)

So, if the cause is set down at the defendant's instance, and the plaintiff does not appear, the defendant cannot take advantage of his absence, unless he has served a subpoena to hear judgment on the plaintiff; but if it be served, and an affidavit of such service is shown, the bill will be dismissed with costs. (w)

- *346 *Where a plaintiff had undertaken to speed his cause, and obtained an order to withdraw his replication, and set down the cause upon the bill and answer, but did not serve a subpoena to hear judgment, or appear when the cause was called on, it was held, that the undertaking of the plaintiff was equivalent to serving the subpoena to hear judgment, and that the defendant was entitled to have the bill dismissed with costs. (x)

Decree.

A decree cannot be made upon an interlocutory order, unless with consent. (a)

Immediately, or some time after the hearing of the cause, the decree or order of the court is made upon the matters in question, and minutes of it are taken down by the register. These minutes are afterwards fully drawn out by the register.

If any mistakes appear, and the register cannot consistently with his duty make the alteration required, an application, by motion or petition, may be made to the court, to rectify the minutes. (b)

- The decree is afterwards passed and entered. By an order, all decrees and dismissals of bills on a hearing, must be drawn up, signed, and enrolled before the first day of the next Michaelmas or Easter term, after the same is pronounced, unless leave of the court be obtained, as it may by motion or petition, as of course, to enter the decree, *nunc pro tunc*. (c)
- *347

A decree drawn up, passed, and entered, cannot, on further

(v) Har. Ch. Pract. Newl. Ed. p. 306.

(w) Ib.

(x) Rogers v. Groom, 17 Veq. 130.

(a) Allan v. Bower, 3 Bro. C.C. 153.

(b) As to this motion, see post.

(c) Smith v. Clay, 3 Bro. C. C. 642,

643. Newl. Har. 322.

directions, or by petition, (d) or by another bill, (e) or in any way be reversed, altered, or explained, except on a rehearing; and if the decree is signed and enrolled, a bill of review is necessary. (f)

It never was usual, and it is now very uncommon to express in the decree the reasons upon which it is founded. (g) In extraordinary cases it is sometimes done.

The decree is either *final* or *interlocutory*.

Where references to the master are necessary to ascertain facts upon which the decree must be founded, as in cases of account, or on questions of title, (h) the decree is always interlocutory. It is so, also, where the court thinks proper to direct an issue, or a case upon which we shall presently observe; a final decree being afterwards made.

No person but parties in the cause can be affected by the decree; and where the decree is against the principal, the plaintiff must proceed at law to recover the possession, if he has not made all the persons deriving an interest in the lands parties to the suit, unless the interest was acquired pending the cause. (i)

*Upon a decree, taken by *default* of the *defendant* at the *348 hearing, the evidence is not to be entered as read. (k)

Formerly, in decrees to account before a master, there was a clause in them, that if there should be any special matter in taking the account, the master might state it specially, but decrees are now drawn up without this clause, and a master may state special matter notwithstanding. (l)

Generally, no interest can be allowed; where it is not ordered or reserved by the decree. After a direction of a trial at law, a reservation of general directions will be taken to include costs, interest, and every thing; but in the common case of reference to a master, it is taken to be otherwise: and the reason appears to be, that the question of interest should be pointed out to the master, that he may have notice and attention to that matter so reserved, that his report may be adapted to it; (m) but still there

(d) *Taylor v. Popham*, 15 Ves. 76.

(e) *Earl of Darlington v. Pulteney*, 3 Ves. 398.

(f) *Ib.* and 1 Ves. 83. *there cited*.

(g) *Ex parte the Earl of Balbaster*, 7 Ves. 373.

(h) See 6 Ves. 323.

(i) *Dunne v. Farrel*, 1 Ball and Beatty, p. 124.

(k) *Stibbs v. —*, 10 Ves. 39.

(l) *Asen*, 2 Attr. 631.

(m) See *Champ v. Mood*, 2 Ves. 470.

is a discretionary power in the court, to allow interest upon special circumstances, as where the demand in its nature carries interest, as a bond, &c. or where it appears that the administrator has made interest of his intestate's effects, whilst the suit has been depending. (*)

*349 The decree in most cases reserves all further directions till after the master's report, and by such reservation the court can give any subsequent relief, incidental to the plaintiff's case. (s)

Where the court have, at the hearing of a cause, reserved any of the matters in question between the parties till after the master has made his report, the court will not determine those matters in a summary way upon motion, (unless where the motion is for a receiver,) but the plaintiff must set it down in the ordinary way upon the equity reserved. (p)

If a vendee files a bill for a specific performance, the court will, by its decree, refer it to the master to appoint a short day for the payment of the money, and to compute interest till that time; and if, upon a tender of a sufficient conveyance, the principal money and interest should not then be paid, the plaintiff's bill to be dismissed (*quoad hoc*) with costs. (q)

It is the constant practice of the court in decrees against a mortgagee upon a bill for redemption, or against an executor to account, to direct it without future words, viz. to account for what they have, or might have received, if it had not been for their own default; and yet if the persons decreed to account receive any thing subsequent to the decree, it is inquirable before the master, and the defendants in each case must bring such sums so received to account. (r)

*350 *It is a rule, that if the plaintiff is entitled to relief against both defendants, and one ought to indemnify the other defendant, who is decreed to pay to the plaintiff, the court often gives liberty to that defendant to prosecute the decree against the other. As where a surety pays money, the principal must indemnify the surety, and the court will make a decree over. (s)

(v) Ryves v. Coleman, 2 Atk. 440.

(g) Darnley v. Fortescue, 3 Atk. 334.

(p) Cooke v. Grype, 3 Atk. 490.

(q) Lowther against Andrews, 1 Bro.

C. C. 303.

(r) Bulstrode v. Bradley, 3 Atk. 532.

(s) Walker v. Purwicks, 2 Ves. 622.

In the case of an executor committing a *devastavit*, and a decree for payment of the amount; the debt is considered as due from the time of the *devastavit*, and not from the date of the decree; and, therefore, where a person was committed under an attachment for breach of a writ of execution of a decree for payment of money on account of a *devastavit*, it was held, that as he had, between the time of the *devastavit* and the date of the decree, taken the benefit of an insolvent debtor's act, he was, after being ordered to be discharged by the court of quarter sessions, brought up on a *habeas corpus* before the chancellor, and discharged. (i)

The cases where a bill is retained, that there may be a trial at law, are where it is necessary to establish the right at law in order to found the equitable relief. (a)

It is not a necessary consequence that the court will not ultimately determine against the *plaintiffs in equity, because the *351 bill has been retained. The bill, it seems, may be afterwards dismissed. (b)

After a decree directing inquiries, the parties may by consent obtain an order to dismiss the bill with costs, as such an order could be made upon further directions. (c)

After a decree a bill cannot be dismissed, except upon a rehearing or appeal; but if parties are desirous of an arrangement for disposing of the fund in court, that may be accomplished by consent on further directions. (d)

In a case where the original decree was lost, but had been acted upon by reports, and recited in an order on further directions, it was on motion ordered to be drawn up from an office copy, and entered *nunc pro tunc*. (e)

If the defendant has appeared to the suit, and is afterwards in contempt, a decree, it seems, may be taken *pro confesso*, and the plaintiff in such case takes "such decree as he can abide by," and himself draws up the decree; but if the defendant has not appeared, then, in pursuance of the statute, (f) the court hears

(d) *Wheldale and Wheldale*, 16 Ves. C. C. 622; but see *Duke of Leeds v. Lord Radnor*, ib. p. 519.

(a) *Watson v. Low*, 6 Ves. 151.

(e) *Anonymous*, 11 Ves. 169.

(b) See *Harmood and Oglander*, 6 Ves. 225., and *Curtis v. Curtis*, 2 Bro.

(d) *Lashley v. Hogg*, 11 Ves. 692.

(e) *Donce v. Lewis*, 11 Ves. 601.

(f) 6 Geo. II. c. 25.

the pleadings, and itself pronounces the decree, and does not permit the party to draw up his own decree. (g)

- *352 *Where a bill is amended after an answer, if the amended bill is not answered, (h) or is insufficiently answered, (i) the plaintiff is entitled to a decree, that the bill be taken *pro confesso* generally.

The interest of infants is so far regarded that no decree can be made against an infant, without having a day given him to show cause, after he comes of age; and he is served with a subpoena to show cause, within six months after coming of age, why a decree should not be made absolute; and it is made absolute without entering an appearance, if he does not appear. (k) But if an infant conceives himself aggrieved by a decree, he is not under a necessity to stay till he comes of age before he seeks redress, but may apply for that purpose as soon as he thinks fit; neither is he bound to proceed by way of rehearing or bill of review, but may impeach the former decree by an original bill. (l)

- In those cases where a bill of foreclosure is brought against an infant, it is usual to decree a foreclosure, with a day to show cause (m) when he becomes adult; but the court, in case the mortgagees consent to a sale, will direct an inquiry, whether it will be for the infant's benefit; (n) and when a day is given to show cause, *the infant when of age is not allowed to ravel into the account, nor is he entitled to redeem the mortgage, by paying what is reported due, but is only entitled to show an error in the decree. (o) And it has been held, that an infant who had a day to show cause, having attained twenty-one, and left the kingdom, to avoid his creditors, permission may be given to serve the clerk in court with the subpoena. (p)

An infant, when plaintiff, is, unless under extraordinary cir-

(g) Geary v. Sheridan, 11 Ves. 192.; and see Ogilvie v. Hearne, 13 Ves. 565.

(h) Toplin v. Stuart, 4 Ves. 619.

(i) Turner v. Turner, cit. 4 Ves. 619. in note.

(k) Wharatt v. Broughton, 1 Ves. 183. Savage v. Carroll, 1 Ball and Beatty, 651.

(l) Richmond v. Tyleur, 1 P. Wms. 734.

(m) Goodier v. Ashton, 18 Ves. 63. Booth and Dick, 1 Vern. 295.

(n) Mondrey v. Mondrey, 1 Ves. and Bea. 83.

(o) Malinch v. Dalton, 3 P. Wms. 352. In Lynn and Willis, 2 Eq. Ca. Abr. p. 11, it is said to be the settled practice.

(p) Black v. Glegg, 1 Dick. 704.

circumstances, (q) as much bound, and as little privileged, as one of full age; (r) but the court will take care that the infant does not make any injurious submission by its bill, and will, if necessary, when the cause is brought on, make an order for the infant to amend the bill, paying the costs of the day, (s).

An infant has been allowed to show cause, when he came of age, against a decree in his own cause respecting real estate; (t) but was held to be bound by a decree in a cause regarding personal estate where he was plaintiff, as much as a person of full age; for it would be most mischievous with regard to personal estate, if an infant, after being of age, was allowed by a new bill to dispute any thing done during his minority, as to *354 maintenance, education, (u) &c.

Where there is a decree nisi against infants, on such infant's coming of age, and before the decree is made absolute, he may put in a new answer, (the answer of his guardian not being binding upon him,) (v) make a defence, and examine witnesses anew. (w)

Where lands are devised to trustees, to be sold for payment of debts, and the heir at law is an infant, he has no day given him to show cause on his coming of age, for nothing descends to the heir; (x) but it is otherwise where there is no devise of lands expressly to any particular person. (y)

When satisfaction is sought out of real assets descended to an infant heir, so that the parcel may demur, the court will appoint a receiver of the real estate descended. (z)

Lord Keeper North appears to have held, that a debt by decree should be paid after a judgment, but before debts by bond; (a) and there was, for a considerable time, a struggle in

(q) See *Bonnet v. Lee*, 2 Atk. 530.

(u) *Napier v. Lady Effingham*, 2 P.

(r) *Lord Stoph. v. Lord Hartford*, 2 P. Wms. 519. *Gregory v. Molesworth*, 3 Atk. 636. *Windham v. Windham*, 2 Freem. 127.

Wms. 401.

(x) *Cook v. Parsons*, 2 Vern. 429. S. C. *Prin. in Ch.* 184; but see note 2. to report in Vern.

(s) *Serie v. St. Eloy*, 2 P. Wms. 367.

(g) *Blatch v. Wilder*, 1 Atk. 421;

(t) *Lady Effingham v. Sir John Napier*, 2 P. Wms. 401. mentioned 3 Atk. 427.

and see *Uvedale v. Uvedale*, 3 Atk. 119; and see *Booth v. Rich*, 1 Vern. 295.

(w) *Gregory v. Molesworth*, 3 Atk. 636.

(a) *Sweet v. Partridge*, 2 Dick. 636. and *Docker and Horner*, there mentioned.

(z) *Fountain v. Caine and Jeff*, 1 P. Wms. 503.

(e) *Harding v. Edge*, 1 Vern. 143.

this court, before it was decided that its decrees were *equal to* judgments at law; but that was determined by *Lord Jaffries, (b) and was completely settled about the time of *Morrice v. The Bank of England*. (c) It is, however, only equal to a judgment at law, so far as concerns the *personal estate* of the party against whom a decree is made; for a decree does not, like a judgment, affect the *real estate*, (d) unless in the course of administration. (e) If, therefore, there be a decree for a debt, and the defendant dies, leaving no personal estate, but a considerable real estate in fee, the latter would not be affected by the decree, in the hands of the heir, as it would in the case of a judgment. (f) But though a decree, unlike a judgment at law, does not affect the *real estate*, yet it has in other respects a superiority. For, upon a *sequestration*, by which courts of equity enforce their decrees, the *goods* of the party may be sequestered, although the party is in custody upon an *attachment* for a *contempt*, in not performing the decree; whereas, at law, if a *copias ad satisfaciendum* is executed, no *fiery facias* can issue. (g) There are, however, cases where even decrees have been held to bind land, as where a decree is to hold and enjoy over; the interest under such decree being taken to be similar to an estate by *vestitus*. (h)

*356 A mere decree for an *account* of the demand of *the plaintiff, and of the *personal estate* come to the hands of the defendant, with a direction for payment out of the result of that account, is not a decree to prevent the executor's confessing or paying a judgment. (i) There must be a *report* and a *final decree*, to make it equal to a judgment. (k)

If an executor pays under a decree, and afterwards a creditor upon a judgment subsequent to the decree sues at law, the court will enjoin him. (l)

It is an established rule not to set aside a decree, merely be-

(b) *Seale v. Lane*, 2 Vern. 89.

(f) *Bligh v. East Darnley*, 2 P.

(c) For. 218. and S. C. on appeal in house of lords, 4 Bro. P. C. p. 207. a case, Lord Eldon observes, "remarkably well reported." See also 3 P. Wms. 401. in note F. see *Perry v. Philips*, 10 Ves. 37. ; and see *Gray v. Chiswell*, 9 Ves. 125.

Wms. 621.

(g) *Morrice v. Bank of England*, For. 222.

(h) *Ib.*

(i) For. 217, *Smith v. Haskins*, 2 Atk. 386.

(k) *Ib.* *Perry v. Philips*, 10 Ves. 47.

(d) 2 P. Wms. 621.

(l) *Morrice and Bank of England*, For. 218.

(e) 1 Ves. 497.

cases obtained by the consent of counsel on both sides. If conclusion could be proved it would be different.(m)

When the chancellor himself first makes a decree, it is properly the declaration of his judgment, and is not a perfect and complete decree before the enrolment; for, till that time, he may *rehear, alter, change, or reverse* it: it is not his final, absolute judgment, till enrolled.(n)

Enrolment is the engrossing of the decree on parchment, and leaving it with the proper officer. The signing and enrolling of decrees with expedition is not encouraged, because, if there is a small mistake in the decree, it occasions the expense of an appeal to the lords, or a bill of review. This applies particularly in cases of account; *for often, in the course of the *357 account, some particular direction, necessary to do justice, has been found out, which could not appear before, upon which liberty has been granted to rehear, which, if the decree was signed and enrolled, could not be done.(o) Decrees in account, therefore, are seldom signed and enrolled.(p) The inconvenience of the quick signing of decrees, is the reason of giving liberty to the party to enter a *cavest*, without giving any reason for it, which will prevent the enrolling for a month,(q) or twenty-eight days from the time of presenting the decree to the lord chancellor to be enrolled, and notice given by the lord chancellor's secretary, to the clerk on the other side.(r)

A decree may be enrolled by the plaintiff or defendant;(s) and after an *abatement* (t) the death of a party, for instance.(u)

After the decree has been enrolled, applications have, in some instances, been made to *undo the enrolment*. In a case before Lord Hardwick, after noticing some precedents relating to this subject, he thus expresses himself: "Both these precedents, therefore, prove it to be *discretionary* in the court (I do not mean arbitrarily) to exercise this power if they see fit;"(v)

(m) *Harrison v. Rumsey*, 2 Ves. 488.
Smith v. Turner, 1 Vern. 274.

(n) *Legal Jud. &c.* p. 248.

(p) *Anon.* 1 Ves. 326.

(q) *Staunton v. Oldham*, 2 Atk. 383.

(r) 1 Ves. 336.

(s) *Barnet v. Theobald*, 1 P. Wms. 609.

(t) *Gartside v. Isherwood*, 2 Dick. 612.

(u) *Duchess of Bucks v. Sheffield*, Amb. 586.

(v) 2 Ch. Cps. 227. Nels. 169.

(v) 1 Ves. 207. *Kemp v. Squire*.

and if the enrolment was gained by surprise or irregularity, it will be opened.(v)

*358 Where error appears in the body of the decree, the court will open the decree ;(w) and if the enrolment was gained by surprise, or irregularly, it will be opened.(x)

Accordingly, where the defendant was in a *bad state of mind*, and the merits of the case had not been entered into, the house of lords ordered the enrolment to be set aside, and that the decree should be opened, and an opportunity given to bring on the cause in a proper manner.(y)

So, where, owing to the negligence of the solicitor, the bill had been dismissed, the court opened the enrolment.(z)

In a subsequent case,(a) Lord *Loughborough* refused to open the enrolment, though it seems the bill was dismissed, owing to the negligence of the solicitor; but when the cause came on again upon a fresh bill,(b) Lord *Eldon* seems to have doubted, whether the decision in that respect was correct.

A motion to open the enrolment of a decree, to stay proceedings under it, to give an opportunity of appeal, will not be granted, if the decree has been made upon the merits.(c)

*359 When the decree is signed and enrolled, a writ of execution issues, with which the defendant is, in general, personally served; but service on the clerk in court is an motion sometimes substituted, as, where the defendant conceals himself.(d)

If a defendant attends the hearing of a cause, and has notice of the decree by being present when it is pronounced, if he does any act that is a contravention of the same, he is guilty of a contempt, and punishable for it, notwithstanding the decretal order is not drawn up; otherwise, it would be extremely easy to elude decrees, some of which in their nature require a considerable length of time before they can be completely drawn up.(e)

(v) Anon. 1 Vern. 135.

(w) Grice v. Goodwin, Prec. Chan. 200, 1.

(x) Anon. 1 Vern. 131.

(y) Benson v. Vernon, Nov. 1745, in the house of lords, see 1 Ves. 206.

(z) Robson and Cranwell, Dec. 8, 1731, (should be 18th,) before Lord King,

quoted 1 Ves. 205. and reported 1 Dick. 61. Kemp and Squire, 1 Ves. 205.

(a) Pickett and Loggan, 5 Ves. 702.

(b) 14 Ves. 231.

(c) Charman v. Charman, 16 Ves. 115.

(d) 12 Ves. 203.

(e) Ship v. Harwood, 3 Atk. 665; and see 12 Ves. 202.

Where the defendant had notice of a decree to which he was no party, by being present when it was pronounced, and paid money contrary to the decree, it was ordered he should pay the same again. (f)

If, after service of the writ of execution of the decree, the defendant refuses to perform it, the usual process issues, as in other cases of contempt. (g)

If the party goes to prison in respect of his contempt, and continues a considerable time in custody, the plaintiff may cause him to be brought into court by an *habeas corpus*, and admonished; and if he still persists in his contumacy, the court may set a fine upon him, and award *process out of the petty- *360 bag to the sheriff, where his estate lies, to levy and pay into the treasurer, and may order him to be kept a close prisoner. (h)

If a party refuses to perform a decree, and an attachment issues, and the return to the attachment is, that the party is in the custody of the warden of the fleet, a motion may be made for a sequestration. (i)

Commissioners, on a *commission of rebellion*, have it in their discretion to take bail of a person for not performing a decree. (k)

After a decree against a corporation for a sum of money, and a *distringas* issued out against them, the court refused to give them any time, or to let them be examined on interrogatories: it is otherwise, where it is a *distringas* on mesne process. (l)

If the company have no goods, it has been held that the members, in their private persons, are liable. (m)

Where a decree is that the defendant shall deliver up an estate, a motion must be made that a writ of injunction should issue, enjoining the defendant to deliver up possession of the estate, according to the decree which was pronounced in the cause. Upon this order may be grounded the *writ of assistance* to be executed by the sheriff *in case of disobedience. This is not a *361

(f) Sir Thomas Harvey v. Montague, 1 Vern. 57.

(g) See ante, p. 162, etc.

(h) See Newl. Har. 333. and 4 Bro. C. C. 30. there cited.

(i) Errington v. Ward, 18 Ves. 314.

(k) Inglet v. Vaughaan, 1 Ch. Rep. 261. S. C. 1 Dick. 7.

(l) Harvey v. East-India Company, 2 Vern. 395. S. C. Proc. Ch. 129.

(m) Dr. Salmon and Hambrogh Company, mentioned 2 Vern. 396.

very common proceeding, but is the only mode of obtaining immediate possession of land, when decreed.(n)

The course of proceeding to be observed previous to an application for a *writ of assistance*, appears to be, 1. Service of a writ of execution of the decree; 2. An attachment for disobedience of the decree, founded on an affidavit. This attachment is not executed, but is merely the foundation of the next process, viz: 3. An order for an injunction to enjoin the party to deliver possession. 4. A motion for a *writ of assistance* upon proof of service of the injunction, and its not having been complied with, and an affidavit of the facts, which is a motion of course.(o)

The *writ of assistance* appears to have been first employed in the reign of *James the First*:(p) from that time, though in general parlance, it is said that the decree of the court acts only *in personam*; yet, if the possession of lands is decreed, and the defendant refuses to perform the decree, the court directs this writ to the sheriff, in enforcement of its decree;(q) but the court cannot to this day issue such a writ as to lands in the *plantations*; but if the party is in England, a decree respecting lands *362 in the *plantations* may be enforced by process of contempt, *in personam, and sequestration, which is the proper jurisdiction of the court.(r)

An *escape warrant* lies by statute,(s) in respect of persons escaping, who have been committed for a contempt, in not performing orders or decrees made in courts of equity, but does not extend, it seems, to escapes of persons committed for contempts generally.(t)

Where there is an equitable demand, and the party is taken in execution on a decree, the court will, notwithstanding, issue all its process, by way of sequestration, *against his lands and effects*; and the body being detained is not in this court a satisfaction: the reason is, because he is detained for the con-

(n) *Huguenin v. Baseley*, 15 Ves. 180.

(o) *Dove v. Dove*, 2 Dick. 618, etc.

S. C. 1 Bro. C. C. 375.; and see *Stribley v. Hawkie*, 3 Atk. 275, 6.

(p) *Pen v. Lord Baltimore*, 1 Ves. 454.

(q) *Stribley v. Hawkie*, 3 Atk. 275.

Roberdeau v. Rous, 1 Atk. 543. *Forster v. Vassal*, 3 Atk. 537.

(r) 1 Ves. 454.

(s) 5 Anne, c. 9.

(t) *Paine's Case*, 1 F. Wms. 438. S. C. 1 Strange, 99.

tempt; but at law the detaining the body is a satisfaction, and you cannot afterwards take his goods.(a) But no sequestration lies till the time for the return of the attachment is out, on which the body was taken.(b)

In the *ecclesiastical* decrees are in like manner enforced by sequestration, though Chief Baron Hale, and Baron Mordaunt, could never be prevailed upon to grant it.(c)

Sequestrations have before been noticed.(d) Under a sequestration for the nonperformance of a decree, the sequestrators may take possession of the real and personal estate of the party, and receive the rents, issues, and profits of the same, *363 until he has fully performed the decree.(e)

Sequestration for nonperformance of a decree, is said to fall to the ground by the death of either the plaintiff or defendant.(f) which is not the case of a judgment at law, an extent upon which does not so abate: a proof this, that a sequestration is only a personal process.(g) In one case, however, where the suit was revived after the defendant's death, the sequestration was discharged as to the real, but not as to the personal estate.(h)

Ecclesiastical estates may be taken upon a sequestration; but the bishop, in such case, allots a sufficient part of the living for the service of the cure.(i)

If an estate be sequestered, and any persons claim an interest in the estate, (a mortgage for instance,) they may be examined *pro interesse suo*, and interrogatories exhibited before the master for that purpose, who makes his report. Exceptions cannot be taken to the report; but, if objectionable, should be set down on the report.(k)

Of directing an Issue, a Case, or an Action at Law.

On the hearing of a cause, the chancellor often deems it ex-

(a) *Horn against Horn*, Ambler, 704. *Bligh v. Lord Darnley*, 2 P. Wms. 619. and see *Martin v. Kerridge*, 3 P. Wms. 240. *Burdett v. Rockley*, 1 Vern. 118., and the great case of *Colston v. Gardiner*, 2

(b) 3 P. Wms. 240.

(c) See *Guavera v. Fountaine*, 2 Freem. 99.

(d) Ante, p. 16.

(e) Newl. Har. 333.

(f) *Wharam v. Broughton*, 1 Ves. 182. *University College Oxford v. Foxcraft*, 1 Vern. 100. 8. C. 2 Ch. Rep. 241.

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(g) *Bligh v. Earl Darnley*, 2 P. Wms. 622.

(h) *Hyde v. Greenhill*, 1 Dick. 107.

(i) *Ex parte Meymot*, 1 Atk. 200.

(k) *Hamplyn v. Lee*, 1 Dick. 94.

petition to direct an issue, or a case. *References from equity, except in the two cases of an *heir*, (h) and of a *rector*, (m) proceed not of right, but of discretion, (n) to satisfy the conscience of the court, (o) concerning doubts as to facts, or as to the law. In doubts regarding facts, an issue is directed; doubts of law are referred to the judges in the shape of a case.

384* The chancellor has a right, if he chooses, (with the before-mentioned exceptions,) to take upon himself the decision of every fact put in issue upon the record; but he exercises it, to use Lord Eldon's expression, "very tenderly and sparingly." (p) When, however, after an issue directed, he administers equitable relief, his own judgment ought to concur with the verdict; or, at least, he ought not to be dissatisfied with the verdict; if he is, a new trial will be directed. (q)

If an issue is directed at the rolls, a motion for a new trial may be made, before the chancellor. This has been done to avoid an appeal; but the chancellor observed, if there was any particular discussion, he should recommend it to be carried to the rolls. (r)

*365 If a special jury, (s) or a view, be necessary, it must be moved for before the chancellor; and where an issue is directed it is proper to move the chancellor for costs for not going on to trial. (t)

The costs of an issue do not follow the verdict, as it does at law, but are ordered at the discretion of the chancellor, when the suit comes on, for farther directions. (x)

Issues may be directed not only upon the hearing of the cause, but on exceptions upon facts before the master. (u)

If exhibits are upon trial found to be forged, the court will not allow the party to go into other evidence. (z)

There is no instance of an issue directed to try a trust. (y)

When the chancellor directs an issue, he usually orders that

(l) Vid. *Pemberton v. Pemberton*, 11 Ves. 53.

(m) See 3 Blac. Com. 452.

(n) Vid. *O'Connor v. Cook*, 6 Ves. 671. S. C. 8 Ves. 538.

(o) *Richards v. Symes*, 2 Atk. 390.

(p) *Ib.* p. 671. *Warden, Sec. of St. Paul's v. Morris*, 9 Ves. 168.

(q) *O'Connor v. Cook*, 8 Ves. 536.

(r) *Pemberton v. Pemberton*, 11 Ves. 50, 52, 53; but see *Bonhills v. Bothwell*, 2 Ball and Beatty, 56.

(s) 2 P. Wms. 68.

(t) *Anon.* 2 P. Wms. 68.

(u) 1 Ves. jun. 135.

(v) *Kemp v. Mackrell*, 2 Ves. 570.

(z) *Ib.*

(y) *Yates v. Hamby*, 2 Atk. 383.

the depositions in the cause shall be read at the trial of the issue, if the witnesses be then dead, or proved to be in such a state of health as not to be capable of attending; for, without such an order, to make the depositions evidence at law, the whole record, the bill, answer, and other proceedings, must be read. (z) In a recent case, the depositions were ordered to be read, with a direction "that, if the defendant chooses to examine the witnesses upon interrogatories, in the mean time, he shall be at liberty to do so." (a) *366

Upon an issue, an order will not, as of course, be directed "that each party should have liberty to examine the other as a witness;" but, if ordered, it must be with consent. (b) The issue is assigned one, and tried in an action on the case, either at bar, at the assizes, or at the sittings at nisi prius, in London or Middlesex. (c) The master settles the issue, in case the parties differ as to the terms of it. (d)

The court seldom or ever directs a trial at bar, but only intimates that it would be desirable; (d) though, it appears, Lord Hardwicke directed a trial at bar in the court of king's bench, provided the party praying such trial would consent that if he prevailed, he would be contented with *no* *pro* costs; (e)

If an issue be directed, and the defendant neglects to name an attorney for the purpose of trying the issue, the court will direct him to do so in four days, or the issue to be taken as tried, and a verdict for the plaintiff; (f)

The fact of a partnership depends upon so many circumstances, that on the hearing of a bill for the taking of partnership accounts, an issue, if prayed, is seldom refused; (g)

*When a case is directed for the opinion of the judges, it is usual to refer it to the master to settle the case; but the facts to be noticed in it may be stated in the order by the court; (h) *367

If the chancellor is dissatisfied with the opinion of the court

(z) Palmer v. Lord Aylesburg, 15 Ves. 176. Corbett v. Corbett, 1 Ves. and Bea. 342.

(a) Corbett v. Corbett, 1 Ves. and Bea. p. 242.

(b) Howard v. Smith, 1 Ves. and Bea. 374.

(c) 1 Turb. and Ves. 315.

(d) Anon. MS.

(e) Baker v. Hart, 3 Atk. 546, 8 G. 1 Ves. 23.

(f) Wilson v. Gings, 1 Dick. 521.

(g) Peacock v. Peacock, 18 Ves. 53.

(h) Ashburnham v. Kirkhall, 1 Dick. 73.

upon the case, he sends the same for the opinion of another court. There is but one instance (h) of sending a case back to the same court to be reviewed. (a)

Where an action is directed to be brought and tried, the title is a legal one, and till the plaintiff's right or title is established, he hath no business in equity; but where an issue is directed, it is in order to ascertain a fact, that the conscience of the court may be satisfied before it decides; and in such case, it is proper, if any objections are taken to the verdict, they should be stated to the court by which the issue is directed, that the court may consider them, and see whether they have such weight as to make the court dissatisfied with the verdict. (b)

Where the trial regards matter of importance, new trials are granted according to the circumstances of the case; (i) but after three verdicts (in a case where an issue had been directed); in *368 favour of a devisee, the chancellor, being satisfied with the result of the third trial, refused a fourth. (c)

The chancellor, if he pleases, may grant a new trial, even after a trial at bar; (d) but wherever his conscience is satisfied, and upon the whole, he is convinced that justice has been done, though he may think some evidence was improperly rejected at law, he is at liberty to refuse a new trial. (e)

In case a witness dies, who was examined as a witness at a former trial of an issue betwixt the same parties, and who has been examined in the cause, not only his depositions may be read, but what he swore at the former trial may be given in evidence. (f)

It has been held, that where it is a matter of inheritance, the court, without setting aside the first verdict, if for the more formal determination, in some cases, direct a second trial; and if the court direct such trial without setting aside the former ver-

(h) That was *Utterson v. Vernon*, 3 T. R. 529. 4 T. R. 570.

(i) *Treny v. Hanning*, 10 Ves. 495.

(k) *Towkes v. Chadd*, 2 Dick. 576.

(l) *Baker v. Hart*, 1 Ves. 29. *Cleave v. Gascoigne*, Ambl. 324.

(c) *Pemberton v. Pemberton*, 13 Ves. 290.

(d) *Baker v. Hart*, 1 Ves. 28. *Warden, &c. of St. Paul's v. Morris*, 9 Ves.

165.; and see particularly *Queen and the Bailiff, &c. of Bewdley*, 1 P. Wms. 207. See *Coker v. Fawcett*, 3 P. Wms. 564; and *Clarke v. Montgomery*, 3 Atk. 378. *Richards v. Symes*, 4 Atk. 560.

(e) *Ib.*; and see *Pemberton v. Pemberton*, 11 Ves. 53.

(f) *Coker v. Fawcett*, 3 P. Wms. 563.

dict, then, the first may be given in evidence, and will have its weight with the jury.(g)

In a case where there had been two trials upon the validity of a will, and opposite verdicts, yet an order of the court of chancery, for a new trial at **bar*, was, upon the circumstances **369* of the evidence, refused.(h)

The court will not grant a new trial upon a suggestion that the party was not apprized of a particular evidence, and therefore not prepared to give an answer; for, on finding such evidence brought forward, it was in his power to be nonsuited, and then he might have come back to the court for new directions, and another issue at law would have been directed, notwithstanding the nonsuit.(i)

After a trial and a verdict, a new ejectment cannot be brought, without leave of the court.(k)

The chancellor may go farther in the direction of a new trial than courts of common law can; for, if a verdict is not against evidence, a court of law cannot grant a new trial, but a court of equity will, in order to have justice done; for the verdict must be such as will satisfy the conscience of the court.(l) If, therefore, new evidence be discovered after the trial, a new trial will be ordered by the chancellor.(m)

In many cases, the court considers it as conducive to justice to direct a trial at law: as where a question was, whether a bill of exchange was usurious;(n) or what damages had been sustained by pirating a work.(o)

**Rehearing.*

**370*

A party dissatisfied with a decree, may apply for a rehearing to the judge who decided the cause. A *caveat* is in such case entered to prevent the signing and enrolment of the decree for twenty-eight days; for after enrolment, as before observed, it cannot be reheard.(p) Though only one of several defendants

(g) *Baker v. Hart*, 3 Atk. 542. S. C. 1 Ves. 28.

(h) *Seller v. Ellis*, 7 Bro. P. C. 189. *Total. Edit.*; but see *Sand v. Sands*, 1 Ves. 495.

(i) *Richards v. Symes*, 12 Atk. 321. S. C. Barn. 90.

(k) *Sand v. Sands*, 1 Ves. 495.

(l) *Lord Falconberg against Pierce*, Amb. 210.

(m) *Stace v. Mabbot*, 2 Ves. 553.

(n) 6 Ves. 193. cit. 1 Turn. and Ven. 315.

(o) *Selwyn v. Bridgman*, mentioned 1 Turn. and Ven. 315.

(p) 3 P. Wms. 371.

has signed and enrolled the decree, it prevents a rehearing.(q)

The granting of a rehearing does not stay proceedings on the decree, unless a special order be obtained for that purpose.(r)

By an order,(s) a deposit of 10*l.* must be made by the party applying for a rehearing.

When a petition of rehearing is signed by two counsel, such credit is given by the court to their opinion that the case ought to be reheard, as to order it to be set down.(t)

It is discretionary in the judge, whether he will allow a rehearing;(u) and Lord *Thurlow* on one occasion refused it;(z) but in general, the chancellor considers it as his duty to rehear when called upon so to do, in order, if possible, to save the expense and delay of an appeal.(w)

The petition ought to state the grounds on which it is sought to rehear the cause.(x)

*371 In a case in which Lord *Hardwicke*, on a rehearing, altered his opinion, he observed, "these are the reasons which induced me to alter my opinion, and I am not ashamed of doing it; for I always thought it a much greater reproach in a judge, to continue in his error, than to retract it."(y)

Lord *King* observed, "in cases where he himself was not fully satisfied, he would never reverse his predecessor's decree."(z)

Upon a petition by the plaintiff to rehear, the cause is open as to the whole and every part of it with respect to the defendant; but as to the plaintiff, it is only open as to those parts of it complained of in the petition.(a) If the petition be against the decree in general, though particular reasons are given, the whole is open.(b)

(q) *Gore v. Pardon*, 1 Sch. and Lefr. 234.

(r) 30th April, 1701. See 4 Bro. C. C. 545.

(s) Ord. Cha. 208.

(t) Ambl. 91.

(u) 3 P. Wms. 8.

(v) *Fox v. Mackreth*, Har. Jar. Arg. 451.

(w) *Pentland v. Stokes*, 2 Ball and Beatty, 76.

(x) *Gifford v. Hart*, 1 Sch. and Lefr. 398.

(y) *Galton v. Hancock*, 2 Atk. 439.

(z) *Osgood v. Strada*, 2 P. Wms. 258.

(a) *Rawlin v. Rowell*, 1 P. Wms. 300.

(b) *Colchester v. Colchester*, Sch. Cas. in Chan. 13, 14.

Upon rehearing a cause which was originally heard before the chancellor, it must be opened as a case. (c)

It seems there may be two hearings at the rolls, and a hearing upon appeal before the chancellor; (d) but a rehearing will not be allowed after an appeal to the chancellor from the rolls has been dismissed, (e) unless, perhaps, where there is manifest mistake; or where the judge who made the decree has reason to apprehend, from his own reflections, that he has mistaken the case. (f)

*After twenty years have elapsed from the time of the decree, *372 the court will not permit a rehearing. (g)

There cannot be a rehearing after a decree by consent; (h) but an agreement to submit to such decree as the court should make, and that neither party should bring an appeal, does not prevent a rehearing. (i)

Sometimes, when a cause comes on for further directions, and the decree appears to be wrong, it is, by the consent of all parties, varied, and got rid of by a short petition of rehearing. (k)

If the objection to a decree is upon matter of law apparent, or a mistake in law, to be collected from all the pleadings and evidence, the decree not being signed and enrolled, it is the subject of a rehearing, and there is no occasion for a bill in the nature of a bill of review, unless a supplemental bill is also necessary to introduce new facts; in which case the cause will come on to be heard upon the matter of that supplemental bill, together with a rehearing of the original cause, and the court will vary the decree upon the rehearing, taking into consideration the new, or lately discovered facts; but there is no instance of a bill in nature of a bill of review upon error apparent. (l)

*If a rehearing is permitted, the party is bound to pay such *373 costs, subsequent to the decree, as the court shall think proper. (m)

(c) 3 Atk. 56.

(d) Brown v. Higgs, 8 Ves. 563.

(e) Fox v. Maskroth, 1 Vol. Mar. Juri. Arg. 451.

(f) East-India Company v. Boddam, 13 Ves. 423.

(g) Smith v. Cave, 3 Bro. Ch. C. 643. in note. S. C. Ambl. 649.

(h) King v. Wightman, 1 Anstr. 80.

(i) Black v. Fawcett, 3 P. Wms. 212.

(k) Bailey v. Elkins, 7 Ves. p. 324.

(l) Perry and Phillips, 17 Ves. 178.

(m) Vid. General Order, 4 Bro. C. C. 546. Yowles v. Young, 9 Ves. 173.

In a case where a mortgagee obtained a decree, it was on motion suspended for six months, upon the mortgagor's bringing the money into court, consenting to a receiver, and paying interest and costs, and the plaintiff's undertaking to repay, if the decree should be reversed.(r)

3. Motion to restrain a Creditor from suing at Law.

Before a decree, a creditor cannot be stopped from proceeding at law ;(s) but where a *decree has been made* for the administration of assets, a motion may be made by the executor to restrain a creditor from proceeding at law, upon an affidavit by the executor what money he has in his hands. Until notice of the decree to a creditor, the party seeking to restrain his proceedings at law must pay the costs occasioned by not giving notice, and suffering him to go on. But after notice he is not allowed costs.(t) In one case, it was held, that only those creditors who filed the bill and obtained a decree could be deprived of the advantage of proceeding at law.(u)

If the creditor brought his action *before* the bill was filed, and *377 chooses to *discontinue*, he will be *allowed to prove his costs at law, in addition to his debt.(v)

Formerly, where there had been a decree for administration of assets, the court, *on a bill filed* by the executor, against a creditor suing at law, obtained an injunction to stay proceedings.(w) But Lord Rosslyn altered the practice, and permitted a *motion* to be made to restrain a creditor suing at law; and Lord Eldon adhered to that practice.(x)

There does not seem any difference, whether the decree for the administration of assets is at the suit of creditors or of the executor: in both cases the creditor is restrained.(y)

(r) *Monkhouse v. Corporation of Bedford*, 17 Ves. 380.

(s) *Rush v. Higgs*, 4 Ves. 638.; and see *Largan v. Bowen*, 1 Eph. and Lefr. 299.

(t) *Paxton v. Douglas*, 8 Ves. 520.; and see *Hardcastle against Chettle*, 4 Bro. C. C. 163.

(u) *Sheppard v. Kent*, 2 Vern. 435.

(v) *Goate against Fryer*, 3 Bro. C. C. 23.

(w) See *Farnham v. Burroughs*, 1 Dick. 63. *Douglas v. Clay*, lb. p. 393.

Kenyon v. Worthington, 2 Dick. 668., and *Brooks against Reynolds*, 1 Bro. C. C. 183. a case of that kind. See also what is said in *Sir Chas. Cox's case*, 3 P. Wms. 343.

(x) *Paxton v. Douglas*, 8 Ves. 520.

(y) See 1 Bro. C. C. 185.

4. *Motion to enlarge Time for Payment of Mortgage Money.*

Upon a bill of *foreclosure*, the court will, though with regret, as the mortgagee is often a great sufferer by it, enlarge the time for payment of the mortgage money, (z) for six months, and again for three months, upon paying the interest due, and costs; (a) but if a bill is brought to *redeem*, the court will not extend the time for payment of the mortgage money. (b)

*5. *That Trustees may lease Infant's Estate.* *378

Where the property is small, the court will, on motion, and without a reference to the master, make an order that the trustee may be at liberty to let, with the approbation of the receiver; but that this should not extend to building leases; nor extend beyond the infant's minority. (c)

6. *For Payment of Money into, or out of Court.*

After the usual decree for an account, the court will, on motion, order payment into court of the amount of the principal sums admitted to be due by examination upon interrogatories, but will not extend the order to *interest*: (d) or, at least, not to *all* the interest admitted to be due. (e)

An order for a transfer and payment of money out of court may be made where the right is clear, though the cause has abated by the death of the plaintiff. (f)

If the representative of a deceased person move, as such, for payment of money out of court, there must be a *prerogative administration*. (g)

7. *For leave to prosecute, or come in under a Decree.*

Any creditors who come in under a decree for an account, may, if necessary, obtain an order to prosecute the decree. (h)

*A defendant, if interested in taking the accounts against an *379

(e) *Novosielski v. Wakefield*, 17 Ves. 417.

(a) *Monkhouse v. Corporation of Bedford*, 17 Ves. 382.

(b) 17 Ves. 417.

(c) *P— v. Bell*, 6 Ves. 419.

(d) *Wood v. Downs*, 18 Ves. 49.

(e) *Fairly v. Freeman*, mentioned 18 Ves. 50.

(f) *Roundell v. Curren*, 6 Ves. 250.

(g) *Challnor v. Murhall*, 6 Ves. 118.

Newman v. Hodgson, 7 Ves. 400. *Thomas and Davies*, 12 Ves. 417.

(h) *Crenza v. Hunter*, 3 Ves. jun. 165.

executor, a codefendant, may move, that he be allowed to attend the master in taking the accounts.(b)

8. *To confirm Reports Nisi, or Absolute.*

Reports will presently be observed upon.

Reports regarding *receivers, guardians, or maintenance*, are never, it seems, confirmed.(c)

Nothing but an order for setting down exceptions for argument is a sufficient cause against making the order for confirming the report absolute. Filing exceptions, and making the deposit, are of no avail, without that order.(d)

Either party may set down exceptions to be argued. Sometimes the party against whom exceptions are taken, sets them down, though at some expense, because he can choose where to set them down.(e)

If a motion to confirm a purchase *nisi* be made on the last seal-day but one, and if, on that day, the eight days have not expired, the purchaser cannot move on the last seal-day, that two days after, when the eight days have expired, he may move to confirm the report *nisi*.(f)

After a report is confirmed of a person being the best purchaser, he must, from that time, or rather from the time when he *380 *could* have confirmed the report,(g) pay interest on his purchase money, and the seller becomes a trustee for the purchaser, and the purchaser has all the advantage or disadvantage of any casualty after that time.(h)

Where estates for lives have dropped in between a person's being reported the best purchaser by the master, and his taking possession, the court have directed the purchaser to make some compensation, in consideration of the estate being bettered, or otherwise to have the estate resold.(i)

In a case where there was a loss by fire, after the report, but before the confirmation, it was determined that it should fall upon the vendor; and the circumstance that the sale had been de-

(b) See *Pearce v. Crutchfield*, 16 Ves. Jan. 49.

(c) *Thomas v. Dawkins*, 3 Bro. C. C. 509.

(d) *Gildart v. Moss*, 4 Ves. 618.

(e) *Ib.*

(f) *Coffin v. Cooper*, 11 Ves. 600.

(g) *Twig v. Fyfield*, 13 Ves. 517.

(h) *Ex parte Manning*, 2 P. Wms. 410.

(i) *Blount v. Blount*, 3 Atk. 638.

laid, by the purchaser having opened the biddings, was not considered as of importance.(i)

The rule, that a purchaser shall have possession from the *quarter-day* preceding the sale, does not apply to a *colliery*. The period in such case is from the month or week in which the purchase takes place, according to the usual course of taking the account.(k)

One purchaser will not be permitted to be substituted for another, though he offers to pay in the purchase money, unless upon an affidavit, that there is no underhand bargain.(l)

*9. *Motion for new Trial of an Issue.*

*381

This subject has already been adverted to.(m)

The court, in these cases, feels the great disadvantage of judging of the evidence from the judge's notes.(n)

If a verdict is founded upon evidence that ought not to have satisfied the judge, a new trial will be granted. On the other hand, if it ought to have satisfied the judge, no new trial will be granted.(o)

A party to an issue cannot have a new trial, on the ground that he had kept back material evidence. If it had been kept back *by accident, fraud, or surprise*, and not *ex proposito*, it would be different.(p)

10. *Motions respecting Defendant's Examination.*

Upon a motion for a commission to take the defendant's examination, the time is left to the master, and is not limited by the order.(q)

If an examination taken before the master, in pursuance of a decree, is satisfactory to the master, but not so to parties in the cause, an order may be obtained to refer the examination back to the master to look into it, and see whether it is sufficient; and this, in *general* terms, and without stating any *particular* points of objection; and if he reports it sufficient, an exception

(i) *Ex parte Minor*, 11 Ves. 558.

(k) *Wren v. Kirton*, 8 Ves. 502.

(l) *Vale v. Davenport*, 6 Ves. 615.
Rigby v. Macnamara, 6 Ves. 515.

(m) *Ante*, p. 387.

(n) *Bates v. Graves*, 2 Ves. jun. 288.

(o) *Ib.*

(p) *Standen v. Edwards*, 1 Ves. jun. 133.

(q) *Hairby v. Emmet*, 5 Ves. 683.

may *be taken to his report, and the judgment of the court obtained.

But the taking of exceptions in this general manner is inconvenient and discouraged, and in a case of that description, where the exception was overruled, the court has given costs beyond the deposit.(r)

An order may be obtained, (but it is not of course,) that the plaintiff may be at liberty to add new interrogatories for the examination of the defendant, the examinations already put in being reported insufficient.(s)

After a decree, a motion may be made by one defendant for an order to examine another defendant; but the order is not of course, after a decree, as it is when application is made before a decree.(t)

A defendant(u) or solicitor,(v) arrested on his return home from his examination before the master, will, on motion and affidavit, be discharged, and not only in the original action, but also from detainers afterwards lodged against him.

11. *Motion that Purchaser may complete his purchase; or, by the Purchaser, that he may pay in his Purchase Money.*

*383 If a purchaser under a decree delays paying *his purchase money, a motion may be made for an order upon him, to complete his purchase, by paying the purchase money, with interest at four per cent. from the time he was reported the best purchaser;(x) and if he disobeys the order, he may be committed.(y)

It has, however, been held, that if a purchaser submits to forfeit his deposit, he is not bound to proceed in his purchase.(z)

One purchaser of a lot may, on motion, be substituted for another, on the consent of the original purchaser, and all the parties in the cause.(a)

If two persons make a joint purchase, one of the purchasers

(r) Purcell v. Macnamara, 12 Ves. 166.

(s) Anon. 3 Atk. 511.

(t) Franklin v. Colquhoun, 16 Ves.

218.

(u) Sidgier v. Birch, 9 Ves. 69.

(v) Ex parte Ledwich, 8 Ves. 596.

(x) Child v. Lord Abingdon, 1 Ves. jcn. 94.

(y) Landown v. Elderton, 14 Ves.

512.

(z) Saville v. Saville, 1 P. Wms. 745.

(a) Matthews v. Stubbs, 2 Bro. C.

C. 391.

will not be allowed to move to pay into court one moiety of his purchase money.(b)

14. *Motion to open Biddings.*

Biddings are opened for the benefit of the suitor and of the estate, and not for the advantage of the purchaser.(c)

A person who, from speculations of his own, opens biddings, but is not the purchaser, is not entitled to his costs, although the estate, upon the resale, sells at a much higher price;(d) but if the party opening the bidding does it not on his *own ac- *384
count, but for the benefit of the family, who, by an advance on the resale, has been considerably benefited, he is, under the special circumstances, allowed his costs.(e)

If a solicitor buys in lots, with a view to prevent a sale at an under value, he will be obliged to keep the lots, if the court thinks he ought.(f)

Biddings will be opened on a proper offer, even in favour of a person who was present at the sale.(g)

A motion to open biddings will not be allowed as a rule, merely on an offer made of ten per cent. advance. In some cases, upon a small sum, that advance will be sufficient;(a) in some, even a less advance would be sufficient; and in other cases, more would be required.(b) When biddings are opened, there must be a deposit; nor will the court, upon particular circumstances, alter the rule.(c)

When the manor of *Great Thurlow*, in *Norfolk*, was sold, while Lord *Thurlow* was chancellor, Mr. *Scott* (now Lord *Eden*) moved to open the biddings before Sir *Thomas Sewell*, upon an advance from 5,700*l.* to 6,700*l.* The master of the rolls inquired what deposit would be made? in answer, Mr. *Scott* observed, that all the parties were satisfied with the purchaser, upon *which the master of the rolls replied, not knowing *385

(b) *Darlin v. Marye*, 1 Anstr. 12.

(c) *Anon.* 1 Ves. jun. 453.

(d) *Rigby v. Macnamara*, 6 Ves. 400.
Earl of Macclesfield v. Blake, 8 Ves. 214.
Trefusis v. Clinton, 1 Ves. and Bea. 361.

(e) *Owen v. Foulkes*, 9 Ves. 343.
West and Vincent, 12 Ves. 6.

(f) *Nelthorpe v. Pennyman*, 14 Ves. 517.

(g) *Rigby v. Macnamara*, 6 Ves. 117.
Tait v. Lord Northwick, 5 Ves. 655.
(a) *Upton v. Lord Ferrers*, 4 Ves. 700.

(b) *White and Wilson*, 14 Ves. 152.
Andrews v. Emerson, 7 Ves. 420.

(c) *Anon.* 6 Ves. 513.

the circumstance, that if the lord chancellor was the bidder, he should make a large deposit; the deposit being the only hold the court has on a purchaser; and ordered a deposit of the whole advance.(d)

Biddings, in some cases, have been opened, after confirmation of the report, upon a satisfactory offer;(e) and the rule formerly was, that biddings might be opened, after the report was confirmed, under particular circumstances, and in the discretion of the court.(f)

A great increase of price, with the additional circumstance, that the person for whose benefit the sale was, was in prison, was held a sufficient ground to open the bidding.(g)

But now, it seems, after the confirmation of the report of a purchaser, whose conduct has been fair, the court will not open biddings on account of an increase of price offered,(h) or of negligence, surprise, or circumstances of that kind,(i) nor unless there is fraud(k) or misconduct in the purchaser, or fraudulent negligence in another person; as, the agent; or unless some particular principle arises out of the purchaser's character, as connected *with the ownership of the estate; or some trust or confidence, or his conduct in obtaining the report.(l)

*386

Biddings will be opened upon a second application by the same person, and payment of all costs; the purchaser not appearing upon notice.(m)

Where biddings are opened, it is upon paying the costs to the purchaser, and the master under the general direction makes the allowance. There is no instance of a particular direction for a specific expense.(n)

14. Motion that Executor may file a Bill, or that Legatee may.

If an executor neglects to get in the testator's estate outstand-

(d) Ib. p. 513.

(e) Boyer v. Blackwell, 3 Anstr. 656.

(f) White v. Wilson, 14 Ves. 153.; and see Scott v. Nesbit, 3 Bro. C. C. 475.

(g) See Executors of Fergus v. Gore, 1 Sch. and Lefr. 350.

(h) Morrice v. Bishop of Durham, 11 Ves. 57. overruling Watson v. Birch, 2 Ves. jun. 51. 8. C. 4 Bro. 172.

(i) Chatham v. Grugeon, 5 Ves. 86.

(k) Watson against Birch, 4 Bro. C. C. 177.; and see Gower and Gower, mentioned in that case; and Prideaux v. Prideaux, 1 Bro. C. C. 287.

(l) Watson v. Birch, 4 Bro. C. C. 172.

(m) Preston v. Barker, 16 Ves. 140.

(n) Anon. 2 Ves. jun. 286.

ing on mortgage, an order may be obtained by legatee, that the executor should file a bill within a limited time, or, in default, that the legatees may be at liberty to file a bill.(n)

Master's Report.

A report is a master's certificate to the court, of the facts or matters directed to be ascertained by him, or how upon examination they appear to him, or of something which it is his duty to inform the court of.(o) A report is necessary, in *order to 387 take notice of any thing in the master's office.(p) If a master to whom a reference is made is incapable of attending to the same, the matter will, on motion, be referred to another master.(q)

A special report is never made, unless by the direction of the court; or where, from the difficulty of the subject, the master thinks it proper.

Masters, in reports which are special, are not to set forth the evidence with their opinions upon it, but only state the bare matter of fact for the judgment of the court, in the same manner as in courts of law, where they only state the facts allowed by both sides in a special verdict, but never meddle with any part of the evidence on either side.(r)

The master cannot proceed upon a reference *de die in diem*, without an order for that purpose;(s) but the order is not imperative on the master: he may avail himself of it, or not, as circumstances passing before him, call upon him, in the exercise of sound discretion.(t)

When the master has heard both parties, he prepares a *draught* of his report, and at the request of either party issues a warrant that the parties, or some of them, do again attend him, who have liberty to peruse and take a copy of the *report, and after 388 that, either party may again attend the master, and take out a warrant to settle the report, which the master will do, unless ei-

(n) *Graves v. Hughes*, M. S. 24 Feb. 1813.; and see *Elmalie v. M'Auly*, 3 Bro. C. C. 626.

(o) See *Har. Pract. Newl. Ed.* p. 478.

(p) *Fox v. Mackreth*, 1 Ves. jun. 69.
(q) *Anon.* 9 Ves. 341.

(r) *Duchess of Marlborough v. Sir Thomas Wheat*, 1 Atk. 453.

(s) *Purcell v. Macnamara*, 11 Ves. 362, overruling *Lingham v. Sturdy*, 5 Ves. 423.; and see 1 Ves. jun. 69.

(t) *Purcell v. Macnamara*, 11 Ves. jun. 363.

ther party brings in *objections* in writing to the draught of the report, and takes out a warrant to be heard thereupon; and then the master decides upon the objections, and settles his report, after which no evidence is admitted.(u) After the report is settled, either party may take out a warrant to attend the *signing* of the report. The report may be signed after the plaintiff's death.(v)

If the report is not objected to, it is taken to be correct;(w) and a motion may be made to confirm the same *nisi*, which afterwards, on another motion, will be made absolute.(x)

After the *master's report* is confirmed, the court will not, on an application for that purpose, order the report to be *reviewed*. Errors in computation merely, may be set right at any time.(y)

By a standing order made by the *lords commissioners* in 4 *Wm. & Mary*, it was directed that all reports should be filed within four days after the making, otherwise no decree, order, or proceedings to be had thereupon; but this order is not literally adhered to, and it is sufficient if the report be filed before any proceedings or order is made thereupon.(z)

*389 If the report be objectionable, either party may **except* to the same, upon making a deposit with the register, and the exceptions will be argued before, and determined upon by the court.

When the master by his report *finds a fact*, and his judgment is founded on evidence, he delivers a draft of his report before he signs it, that the parties may take objections; without which, unless by special order, they are precluded from excepting.(a)

Where the party who took exceptions did not lay a material piece of evidence which he had then in his power before the master, to which the error in the master's report was owing, the court would not direct the master to review his report upon any other terms than the exceptant's giving up his deposit.(b)

Where the reference to the master is to see, whether an *answer*, *examination*, or *deposition*, is pertinent or impertinent, the master's judgment is founded merely on his conception of the

(u) Newl. Har. p. 479. and 7 Ves. 587. there cited.

(v) See case mentioned in Morgan v. Scudamore, 3 Ves. 197.

(w) Da Costa v. Da Costa, 3 P. Wms. 142.

(x) See ante.

(y) Hawkins v. Day, 1 Ves. 184.

(z) Eyles v. Ward, 2 P. Wms. 517.

(a) See ex parte Bax, 2 Ves. 388.

(b) Hedges v. Cardonell, 2 Atk. 408.

matters: These reports are not confirmed: he issues no draft to ground objections; but the party takes exceptions to the report in the first instance.(x)

Exceptions cannot be taken to the master's report for costs only,(a) nor for costs, though joined with other matters of exception; but the way is, in such case, to petition, stating the articles objected to, and praying leave to except.(b) *390

If a decree has directed costs, and the master has not taxed them, an exception will lie; but if he has proceeded upon the costs, and has not allowed several items which are claimed, there must be a petition,(c) pointing out the particular grievance, and praying leave to except.(d)

Upon arguing the exceptions, no evidence is admitted in support of the same, but what was laid before the master upon the objections.(e)

The plaintiff, it seems, may take exceptions to the master's report, and at the same time set down the cause for farther directions.(f)

If the master, by his report, states that he cannot take the account which has been directed, this is the subject of farther directions, rather than of exceptions.(g)

Exceptions having been filed, but not set down to be argued, is no cause against confirming a report.(h)

If the exceptant prevails in any of the exceptions, he is entitled to the deposit.(i)

Exceptions to the master's report, under a decree made at the rolls, may,(k) nay, ought(l) to be set down before the lord chancellor; but, upon special reasons, the chancellor may order them to be transferred to the master of the rolls.(m) *391

Though, where exceptions are taken to the master's report

(x) Register's statement of the practice in Price and Shaw, 2 Dick. 732, 3.

(a) Pitt v. Mackreth, 3 Bro. 321.; and see Parcell v. Macnamara, 12 Ves. 170.

(b) Lucas v. Temple, 9 Ves. 299. which seems to overrule Holbeck v. Sylvester, 6 Ves. 417.

(c) 6 Ves. 417.

(d) 12 Ves. 171.

(e) Primrose v. Bromley, cited Newl. Harr. 480.

(f) Yeo v. Frere, 5 Ves. 424.

(g) Lepton v. White, 15 Ves. 436.

(h) Abel v. Nodes, 2 Dick. 730.

(i) Parker against Front, 4 Bro. C. C. 1.

(k) Burdon v. Burdon, 9 Ves. 499.

(l) See Fritwell and Kay, 2 Dick. 605.

(m) Ib.

of a good title; on a bill for a specific performance, it is usual in the exceptions to state the particular objections insisted on; yet it seems that any objection to the title may be taken on the *arguing* of the exceptions.(n)

If the master, by his report, certifies that the defendant has submitted to any thing, and the defendant excepts, and insists that he made no such submission, an affidavit is necessary on his part, to falsify what has been certified; for, though there is no reason that the master's report should be arbitrary and conclusive, yet it will be presumed, *prima facie*, to be true; and it rests on the other side to show the contrary.(o)

Where a report is under an order of reference for the master to inquire, and state his opinion, whether an infant is a trustee or a mortgagee, within the statute 7th Queen Anne;—to approve of a guardian;—make an allowance for maintenance,(p) and the like; exceptions do not lie to such reports; but the report is stated, and brought before the court by petition, and the court will confirm or vary it, according as it coincides in, or differs from the opinion of the master.(q)

*392 The master, whenever any subject occurs in which he wishes to have the examination of a witness, is authorized to take such examination, and a *subpoena* issues for that purpose;(a) and if he sees cause to direct a commission into the country, he does not direct it, but certifies it is necessary.(b) The *subpoena* to a witness to be examined before the master, is the same as to come before the examiner; but it is oddly expressed. The *label* explains the purpose.(c)

The old course in *chancery*(d) was the same as that of the court of *exchequer*; the *chucky court of Lancaster*, and other courts of equity; viz. to insert in the decree, that the master is armed with a power to examine witnesses. That, however, is now not inserted in the decrees of this court; but, instead of that,

(n) Abell against Heathcote, 4 Bro. C. C. 282.

(o) Allen v. Peadlebury, in note B. 3 P. Wms. 142.

(p) As to maintenance, see *ex parte Nicholls*, 1 Bro. C. C. 577.

(q) See statement of practice in Price v. Shaw, 2 Dick. 732, 3.

(a) Parkinson v. Ingram, 3 Ves. 606.

(b) Ib. 607.

(c) Ib. 608.

(d) Ib. 607.

the master certifies that a commission is necessary, and then the commission issues of course.(e)

Depositions in these cases, taken in the country, when returned, are filed by the six clerks; but depositions taken before the masters are kept in their offices.(f)

When a person is once examined before the master, he cannot be re-examined, without an order for that purpose.(g)

A witness examined in the cause cannot be *re-examined *393 before the master, without an order for that purpose;(h) and then, not to any matters he had before been examined to, or in which he may be interested, and the master is to settle the interrogatories.(i)

Although it is an order of course to examine a defendant *de bene esse*, saving just exceptions, yet where the cause is heard, and it appears such defendant is a party interested, it is proper to show cause against such an order, before the witnesses are examined.(k)

Evidence in the cause, though not read at the hearing, may be received by the master.

As where, on a bill for an account, a witness was examined before the hearing, whilst she was interested, but after the hearing she released her interest, and was re-examined before the master, her deposition was allowed;(l) for when the court directs an inquiry into a fact, it is in the nature of a new issue joined; and what will be evidence in any other case, will be evidence before the master.(m)

He may admit depositions taken in a former cause between the same parties, without an order for that purpose;(n) and depositions in a cross *cause, though dismissed.(o) If evidence is *394 improperly admitted exceptions may be taken.(p)

Persons who were not witnesses in the cause may be examined before the master *to the same points*; and upon a question

(e) *Sanford v. Biddulph*, 9 Ves. 36.

(f) *Parkinson v. Ingram*, 3 Ves. 607.

(g) *Cowslade v. Cornish*, 2 Ves. 270.

(h) *Sawyer against Bowyer*, 1 Bro. C. C. 383. 8. C. 2 Dick. 639.; and see what is said of that case, 2 Dick. 751. *Greenaway v. Adam*, 13 Ves. 300. *Smith v. Althus*, 11 Ves. 585.

(i) *Browning v. Barton*, 2 Dick. 508.

(k) *Glover v. Faulkner*, 1 Vern. 452.

(l) *Oallow v. Miece*, 2 Vern. 472.

(m) *Smith v. Althus*, 11 Ves. 584.

(n) *Anon.*, 3 Atk. 544.

(o) *Lubiere v. Geriam*, 2 Ves. 579.

(p) *Anon.*, 3 Atk. 524.

of title as to a specific performance, farther evidence may be produced on both sides before the master.

Where parties go before the master upon a reference, he must receive interrogatories from both, though one of them should not have gone into any proof in the former stage of the cause. (p)

Interrogatories for the examination of a party are settled by the master; not, as in the case of a witness, by counsel. (q)

After the master has settled his report, no further evidence is admissible. (r)

In an account against an executrix, the master was directed to allow items, upon vouchers which it should be verified on affidavit were impounded in the ecclesiastical court; it being the habit of that court not to give up any thing impounded, and the expense of having the officer attend the court would be considerable. (s)

An exception will not lie to the master's certificate, of having settled interrogatories; but the interrogatories ought to be put to the witnesses, who answer as much or as little as they please; and then the master certifies, whether the examination is or is not sufficient, and exceptions may be made to that certificate; but not to the certificate settling the interrogatories. (t)

*395

Objections to interrogatories settled by the master must be taken by exception, not by petition. (u)

A party in his examination may charge and discharge himself in the same sentence, but not in different sentences. (v)

Where there is a general direction in a decree to examine on interrogatories before the master, as the master shall direct; if the party has been examined on one set, and afterwards there should arise another matter, on which the master thinks it proper to be examined, it is, in the judgment of the master, whether, and what time, and how often, he thinks fit that the defendant should be examined; nor is a new order necessary, as in the case of a witness. (w)

(p) Hough against Williams, 3 Bro. C. C. 190.

(q) Purcell v. Macnamara, 17 Ves. 434.

(r) Thompson v. Lamb, 7 Ves. 587.

(s) Neilson v. Cordell, 8 Ves. 146.

(t) Paxton v. Douglas, 16 Ves. 243. Stanyford v. Tudor, 2 Dick. 548.

(u) Hughes v. Williams, 6 Ves. 456.

(v) Kirkpatrick against Love, Amb. 589.

(w) Cowdale v. Cornish, 2 Ves. 239.

Farther Directions.

After the master's report is confirmed, the cause is, on a petition for that purpose by either party, set down for farther directions.

In order to *add* any thing to a decree, the consequence of any proceeding which the decree had directed, the cause must be set down for farther directions. To *alter* the decree itself in the *minutest particular, the cause must be reheard;(a) unless it *396 be in the case of a *charity*.(b) So, an order made upon farther directions is a decretal order, and cannot be discharged on motion, and its being by consent will make no difference.

If, even by a clerical misprision, any thing was inserted in the order, as by consent, to which the party had not consented; it must, it seems, be rectified by a *bill of review*, and cannot be done by motion.(c)

A cause may, in strictness, be set down for farther directions, or upon the equity reserved, before the lord chancellor or the master of the rolls, without regard to the circumstance where it was heard originally; though it is very inconvenient.(d)

If interest is not given as it ought to have been, by the decree, or reserved, it is, strictly, a matter of rehearing; but if the point is made upon a hearing for farther directions, it may be given;(e) for, upon farther directions, the court may add to the decree.(f)

Bill of Revivor.

If any of the parties, *relator*,(g) plaintiffs, or defendants, die, or if a feme sole plaintiff marries,(h) *(it is different if a feme *397 sole *defendant* marries),(i) regularly the suit *abates*, and a bill of revivor is necessary; but though a feme, pending the suit,

(a) Lord Shipbrooke v. Lord Hinchbrook, 18 Ves. 394.

(b) Attorney General v. Whiteley, 11 Ves. 241.

(c) Anon. 1 Ves. jun. 83.

(d) Pemberton v. Pemberton, 11 Ves. 53.

(e) Creuze v. Hunter, 4 Bro. 318.
Sammes v. Rickman, 2 Ves. jun. 36.
Goodyear v. Lake, Amb. 594.

(f) S. C. 2 Ves. jun. 164.

(g) Attorney General and Heath, Proc. Ch. 13.

(h) Durbaine v. Knight, 1 Vern. 318.
Wharum v. Broughton, 1 Ves. 182.

(i) Ib.; and see Abergavenny v. Abergavenny, Vin. Abr. tit. Baron and Feme, Ja. pl. 20.

marries, yet if the cause proceeds, and a decree is made, this is not sufficient ground to reverse the decree.(k) An abatement by death, is occasioned only by the death of such as are so far material parties and concerned in interest, as to make it necessary to have their representatives before the court, previous to a final determination of the cause.(l) If a decree has been signed and enrolled, it ought to be revived by *scire facias*.(m) but where there were proceedings relating to costs, &c. after the decree was enrolled, which the *scire facias* would not revive, the court held a mere bill of revivor to be proper.(n) An assignee, it seems, cannot revive by *scire facias*.(o)

A plaintiff, however, on the death of a defendant, is not obliged to bring a bill of revivor, but may file a *new bill*, if he thinks he can make a better case than by the first bill.(p)

Where there are more than one plaintiff, and one of them dies, and his right survives to the coplaintiff, the suit does not
 *398 abate: as, where two joint-tenants file a bill, and one of them dies.(q) So, if there be a suit for a legacy against baron and feme, who is executrix of the testator, and the baron dies, the suit does not abate.(r)

In like manner, if a bill be filed by husband and wife, for a demand in right of the wife, and the husband dies, it is considered as in the nature of a *chose in action*, and survives to her, and the cause does not abate.(s) So, if a promise is made to husband and wife, and they file a bill, and the wife dies, the suit does not abate,(t) because the whole interest survives to the husband.

If a defendant dies after the hearing of the cause, but before judgment, it is not necessary the suit should be revived, before judgment is given.(u)

(k) See *Cramborn v. Dehakoy*, 2 Freem. 109. S. C. 1 Dick. 3.

(l) See *Finch v. Winchelsea*, 2 Eq. Cas. Abr. n. 1. in marg.

(m) 1 Eq. Abr. 4. in margin, 1 Ves. Sen. 185.

(n) 2 Ch. Rep. 67. S. C. 1 Eq. Abr. 4.

(o) *Dunn v. Allen*, 1 Vern. 46. See Vid. S. C. Ib. 283.

(p) *Spencer v. Wray*, 1 Vern. 463. *Blount v. Doughty*, 3 Atk. 486. *Spencer v. Wray*, 1 Vern. 463.

(q) 3 Ch. Rep. 66.

(r) *Sheberry v. Belgis*, 2 Vern. 349.

(s) *Ason*, 3 Atk. 726. 3 Ch. Rep. 40. 2 Freem. 133.

(t) *Cary*, 88.

(u) *Folk's v. Winstons*, 9 Ves. 461. S. P. *Ashburnham and Thompson*, MS.

Where one tenant in common dies, his representative may revive, without making the surviving tenant a complainant: but in such case, he must make him a defendant.(v)

If a cause has been heard on a bill of *interpleader*, and a trial at law has been directed to settle the rights between the defendants, this puts an end to the suit as to the plaintiff: so that, if he afterwards dies, no revivor is necessary, each defendant being in the nature of a plaintiff.(w)

If an administrator obtains a decree, but dies *before enrol-^{*399}ment, the administrator *de bonis non* may revive this decree, within the equity of the statute called the *Oxford act*.(x)

A creditor who comes in before the master, and proves his debt, and pays contribution, is entitled to revive, if the cause abates.(y)

A bill of revivor, upon a bill of revivor, lies.(z)

If one be named in the *original bill*, who is yet alive, he ought not to be named in the bill of revivor, because the suit never abated as to him; but if named in the bill of revivor only, he may be named in every bill of revivor after, because he was not named defendant in the original bill.(a)

If two joint-tenants exhibit their bill, and one releases, this will not abate the suit as to the other.(b)

Costs, whether given to plaintiff or defendant, fall to the ground by the death of the party *before they are taxed*;(c) but if taxed, and the party to whom they are given dies, they go to the representative, who may revive for costs only.(d)

If any thing remains executory in the decree, besides payment of costs, the party may revive, though the costs are not taxed: and that would carry revivor for costs along with it.(e)

(v) *Fallows v. Wilkinson*, 11 Ves. 313. Hall and Smith, 1 Bro. C. C. 438. contra, *Morgan and Scudamore*, 3 Ves. 198.

(w) *Anon.* 1 Vern. 352.

(x) *Owen v. Carson*, 2 Vern. 287.

(y) *Pitt v. Duke of Richmond*, 1 Eq. Abr. 3.

(z) *Hard.* 201.

(a) *Hard.* 201, 2.

(b) 2 *Freem.* 6.

(c) *Select Cases in Chancery*, p. 21.

(d) *White v. Hayward*, 2 Ves. 462.; and see *Johnson v. Peck*, *ib.* p. 465. Sed vid. contra, *Thorn v. Pitt*, *Select Cas.* 54. where lord chancellor said it was odd there could be no revivor for costs, but the rules of the court must be observed.

(e) *Johnson v. Peck*, 2 Ves. 465. *Blower v. Morreys*, 3 Atk. 772.

However it might have been in the time of *Lord Nottingham, (f) it is now a settled rule, that where costs are payable out of a real estate, (g) or other particular fund, (h) or, wherever any thing of a duty is decreed, (i) there may be a revivor for them.

In the case of a bill of discovery and an answer, and an abatement by the marriage of a female plaintiff, there cannot, it seems, be a revivor for costs. (k)

A decree for a sum against an executor, with costs out of assets, is not a decree in *personam*, but executory; and if he dies, the plaintiff may revive against the representative of the testator, and pursue his assets. (l)

Where the plaintiff brought his bill against the defendant's father for land, and revived it against the defendant as heir, and afterwards the bill was dismissed with costs, it was held, that the defendant was not entitled to his father's costs, but that they died with him. (m)

A devisee, (n) a purchaser, (o) or an assignee, (p) cannot bring a bill of revivor, nor have such a bill brought against them, there being a *want of privity*; but in these cases, an original bill in the nature of a bill of revivor must be brought, (q) upon *401 which the decree will be carried on in the *same manner as it would have been on a bill of revivor, and no new defence permitted. (r)

Lord Hardwicke held, that a *defendant* could not revive but in one instance, i. e. after a decree to account, (s) in which case, both parties are actors, and either may revive; (t) but from subsequent cases, it seems, a defendant, or his representative, (u)

(f) *Morgan v. Scudamore*, 3 Ves. 195. S. C. 2 Ves. jun.

(g) 3 Atk. 772. 812.

(h) *Ib.* 3 Ves. 196. *Kemp v. Mackarel*, 3 Atk. 812. S. C. 2 Ves. 579.

(i) *Johnson v. Peak*, 2 Ves. 465; and see 2 Ves. 579.

(k) *Dodson v. Judd*, 10 Ves. 31.

(l) *Blower v. Morret*, 3 Atk. 773.

(m) *Lloyd v. Powis*, Nels. 147. S. C. 3 Ch. Rep. 65. *Temple v. Rouse*, 2 Ch. Rep. 7. 1 Dick. 16.

(n) 1 Ch. Cas. 174.

(o) 2 Freem. 132.

(p) *Harrison v. Ridley*, Com. 569.

(q) See Lord Say and Sele, *Select Cas. Ch.* 53.

(r) *Clare v. Wordell*, 1 Vern. 543. *Minshall v. Lord Mohun*, 2 Vern. 672.

(s) *Anon.* 3 Atk. 691.

(t) Lord Stowell and Cole, 1 Eq. Abr. p. 3. S. C. 2 Vern. 219. 236. See 1 P. Wms. 263. and *Hollingshead's case*, 1 P. Wms. 743. *Thorn and Pitt*, *Select Cases in Ch.* 54. *Kent v. Kent*, *Proc. Ch.* 197.

(u) *Kent v. Kent*, *Proc. Ch.* 197. *Thorn v. Pitt*, *Select Cas.* 54.

may revive a suit in every case where he or they can derive a benefit from the farther proceeding: (t) the doubts formerly thrown out on this point seem to have arisen from a consideration of the inconvenience of drawing the account of assets: (u)

When an injunction cause abates by the death of either plaintiff or defendant, the rule is, that a motion must be made to revive within a stated time, or that the injunction may be dissolved; (v) but a defendant cannot revive merely for the purpose of dissolving an injunction, and proceeding at law. (w)

A bill of revivor should only contain so much new matter as is necessary to show the right to revive: (x) if it contains more, it is demurrable; (y) *and it should charge that the cause ought to stand revived, and be in the same condition with respect to the parties in the bill of revivor, as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray, that the suit may be revived accordingly. It may be likewise necessary to pray that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets, by the representative of a deceased party. (z) *402

Although a defendant has appeared and answered the original bill, yet, if he cannot be found, to be served with a subpoena to answer a bill of revivor, the plaintiff must proceed under the statute 5 Geo. II. c. 25. to have the bill taken *pro confesso*. (d) Service of the subpoena to revive, will not, on motion, be ordered to be deemed good service, by being served on the clerk in court in the original cause. (e)

It seems unsettled, whether, if an original defendant has had orders for time to answer the original bill, he can begin again with the usual course of orders for time to answer in the revived cause. (f)

If the defendant's time for answering the bill of revivor is out,

(t) *Williams v. Cooke*, 10 Ves. 406.; and see *Horwood v. Schmedes*, 12 Ves.

317. *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2.

(u) See *Morgan v. Scudamore*, 3 Ves. 195. 198.

(v) *Select Cases in Chancery*, 24.

(w) *Horwood v. Schmedes*, 12 Ves. 311.

(x) *Com. Rep.* 590.

(b) 2 Eq. Abr. in margin.

(c) *Mitt. Plead.* 70, 71.

(d) *Henderson and others against Meggs*, 2 Bro. C. C. 137. *James v. Dore*, 1 Dick. 63.

(e) *Brown v. Lee*, 2 Dick. 545. *Lee and Warner*, *ib.* p. 546.

(f) *Fallowes v. Williamson*, 11 Ves. 306.

viz. eight days after appearance, *unless the defendant has obtained an order for further time, the court, on motion, will order the proceedings to stand revived.

So, though the defendant insists by his answer that the plaintiff is not entitled to revive; for this ought to be shown by plea or demurrer; but if it appears at the hearing that the plaintiff had no title to revive, he cannot have a decree.(g)

It seems, that a defendant in a bill of revivor cannot plead a plea which had before been pleaded by the original defendant, and overruled;(h) nor can he by answer contest the justice of a decree.(i)

It appears to be unnecessary to revive against a defendant who has not answered.(k)

Where a suit in equity abates by the death of the plaintiff, his executor or administrator must revive within six years, otherwise the statute of limitations may be pleaded, except where there has been a *decree to account*, in which case, a bill of revivor is considered in the nature of a *scire facias*, and not within, or barrable by the statute of limitations.(l)

Notwithstanding an abatement by death, the court sometimes, with the consent of all parties interested,(m) orders collateral things to be done; such as the delivery of deeds and writings, *404 or *money to be paid out of the bank, without a revivor; but this is only done where the court must deliver itself from the custody thereof, some way or other, and proceed *ex officio*.(n)

Supplemental Bill,

By an order of Lord Hardwick,(o) no supplemental or new bill, in nature of a bill of review, grounded upon any new matter discovered, or pretended to be discovered, since the pronouncing of any decree of the court, in order to the reversing or varying of such decree, can be exhibited, without the special leave of the court first obtained for that purpose, and unless the party

(g) Harris v. Pollard, 3 P. Wms. 348.

(l) Hollingshead's Case, 1 P. Wms.

(h) Samudo against Furtado, 3 Br. 742.

C. C. 72.

(m) Beard v. Earl Powis, 2 Ves. 400.

(i) Clare v. Weyden, 2 Vern. 548. S.

(n) Wharrea v. Broughton, 1 Ves.

C. 1 Dick. 20.

186, 6. Finch v. Winchester, Eq. Ca.

(k) Oxburgh v. Fincham, 1 Vern. 308.

Abr. 2.

(o) 11 Oct. 1741.

exhibiting the same do first deposit with the register of the court so much money as, together with the deposit by the rules of the court to be made, on obtaining a rehearing of the cause wherein such decree was pronounced, will make up the sum of fifty pounds as a pledge to answer such costs and damages as shall be awarded to the adverse party, in case the court shall think fit to award any at the hearing of the cause on such supplemental or new bill. (p)

Diligence forms an ingredient in the mind of the court, on application made for leave to file supplemental bills, on the ground of evidence having been newly discovered. (q)

*A supplemental bill, properly so called, is a bill brought for any new matter arisen since the filing of the original bill, and before the original comes to a hearing. (r) *405

But a supplemental bill, it seems, may be filed, to add parties, where the proceedings are in such a state that the original bill cannot be amended for the purpose. (s)

Supplemental bills are often brought in aid of a decree, as on a decree to account, for want of full direction before; and directions are given under the supplemental bill, that the new matter should be connected with the former decree. (t)

But a supplemental bill, it seems, cannot be filed against one who is not a party to the original bill. (u)

A supplemental bill may be filed, even after a cause has been heard, and an account directed, for a discovery of more evidence touching a matter of account; (v) but where a supplemental bill is brought, after publication, it is irregular to examine witnesses to a matter that was in issue, and not proved in the original cause, nor can such proofs be read; and if there be no proof as to the new matter in the supplemental bill, it will be dismissed. (w)

A supplemental bill, in the nature of a bill of review, may be *406

(p) Astell v. Montgomery, 2 Atk. 138.

(f) Donner v. Fortescue, 3 Atk. 133.

(u) Baskin v. Mackown, 3 Atk.

(q) Barrington v. O'Brien, 1 Ball and Beatty, 142.

817.

(v) Boeve v. Shipwith, 2 Ch. 142.

(r) Jones v. Jones, 3 Atk. 217.

(w) Bagnal v. Bagnal, Vin. Abr. tit.

(s) Mitford's Pleadings 59., who cites 3 Atk. 370.; but see 3 Atk. 617. and Anon. MS.

Chappery (R. A.) Ca. 8, 9.

filed, containing new matter discovered since the filing of the original bill, and a decree not signed and enrolled, together with a *petition of rehearing*, in the nature of a bill of review, praying that the former decree may be rectified in the particulars complained of by the supplemental bill.^(w) It is necessary to obtain leave of the court to file this bill; and the same affidavit is required for this purpose as is necessary to obtain leave to file a bill of review on discovery of new matter.^(x)

Though by the 8 & 9 Wm. III. c. 11. s. 7. a suit shall not abate upon the death of one defendant, but shall go on against the others, yet it must be taken with this restriction, viz. that the subject-matter of the bill is not hurt by the death of such defendant.^(y)

Where the plaintiff a feme sole, married after the suit was instituted, and a settlement was executed, assigning all her right and interest to trustees, for her and the issue; a supplemental bill was considered as necessary.^(z)

So, if a plaintiff becomes bankrupt, his assignees may file a supplemental bill;^(a) but where a small sum of money (£50L.) had been decreed to be paid to the bankrupt, the same, on *petition* by the bankrupt and his assignees, was ordered *to be paid to the assignees, without a supplemental bill;^(b) and though assignees do not file a supplemental bill, the bill cannot be dismissed.^(c)

Where a supplemental bill, after a decree, brings a new person or a new interest before the court, it is open to the parties to make any objection to the decree that might have been made at the first hearing.^(d)

Where assignees of a bankrupt die, or are discharged, and others are put in their room, they cannot revive, but must bring

^(w) *Standish v. Radley*, Barnard. 463. S. C. 2 Atk. 177. 2 Atk. 40.; and see *Goold v. Tankard*, 3 Atk. 35. Lord *Effingham v. Lord Portsmouth*, 1 Ves. 430. *Moore v. Moore*, 2 Ves. 598.

^(x) See *Miltf. Plead.* 82.

^(y) *Brown v. Higden*, 1 Atk. 291.

^(z) *Merewether and Mellish*, 13 Ves.

435.

^(a) *Williams v. Kinder*, 4 Ves. 387. See 1 Atk. 263. *Comyn's Reports*, 590.

^(b) *Setcole against Healey*, 2 Bro. C. C. 322.

^(c) *Sellers v. Dawson*, 2 Dick. 738. S. C. 2 Anstr. 458.

^(d) *Hill against Chapman*, 3 Bro. C.

C. 302.

supplemental bill, to entitle them to the benefit of proceedings in a former suit.(e)

A purchaser, *pendente lite*, may file a supplemental bill, and come into court *pro bono et malo*, and is liable to all costs in the proceedings from the beginning to the end of the suit.(f)

A tenant in tail, claiming upon the death without issue of a preceding tenant in tail, not through or under him, but as a remainder man, is entitled to continue the suit of the former tenant in tail, and to the benefit of the proceedings by a supplemental bill.(g)

Where a bill claims against the first tenant in tail in being, a charge upon the whole inheritance, which is in strict settlement, if the tenant in tail dies without issue, all the proceedings *may, *408 by a supplemental bill, be had against the second son, as if he had been a party to the original bill.(h)

Where a bill is brought, to have the benefit of a former decree, the plaintiff cannot examine witnesses, much less, the same witnesses to the matters in issue in the former cause. But on such a bill the court may examine the justice of the former decree; but then it must be upon the proofs taken in the cause wherein that decree is made.(i)

A supplemental bill must state the original bill, and the proceedings thereon: and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray that all the defendants may appear and answer to the charges it contains. For, if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill, at the same time that it is heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter.(k)

Bill of Review.

When a decree is obtained, and the decree is *enrolled*, the cause cannot be reheard upon *petition*; and the party grieved

(e) Anon. 1 Atk. 38. 8. C. Ib. 571.

(f) Ib. 89.

(g) Lloyd v. Johns, 9 Ves. 37.

(h) Lloyd v. Johns, 9 Ves. 58.

(i) Johnson v. Northey, 2 Vern. 409.; and see West v. Skip, 1 Ves. 245.

(k) Mitf. Plead. 69. who cites 3 Atk. 217.

can in no case *(not even where the decree was on a bill taken *pro confesso*)(a) set aside the decree, or obtain relief against it by an original bill, or collaterally, as by another bill for the same cause; for then the decrees of the court would be opposite, and contrary the one to the other, which would breed the utmost confusion:(b) the only remedy, therefore, in such case, is, by a bill to set aside the decree *for fraud*, or a *bill of review*, which lies against those who were parties to the original bill, and against them only,(c) and must be either for *error apparent on the face of the decree*, or upon *some new matter*, as a release, receipt, &c. proved to have been discovered since; for unless this relief were confined to such new matter, it might be made use of as a method for a vexatious person to be oppressive to the other side, and for the cause never to be at rest.(d)

Where there is error on the face of the bill, the bill may be filed without leave of the court, and, as it seems, may be filed by a person not a party to the original decree, but whose rights are injured by it (e) but where the bill is filed upon evidence come to the knowledge of the party after publication, and which he could not, by using reasonable, active diligence, have *410 known; in this *case, a petition to the court for leave to file a bill of review, supported by a strong affidavit, is necessary, together with a deposit of 50*l.*(f)

If the decree has not been *enrolled*, the mode of proceeding is by a *supplemental bill*, in the nature of a bill of review(g)

The errors complained of must be *errors in law*; nor can the party, upon a bill of review, assign for error that any of the matters decreed are *contrary to the proofs in the cause*.(h)

A *fact* misunderstood by the court, and not introduced into

(a) See *Ogilvie v. Herne*, 13 Ves. 564. Ves. 349. 2 Atk. 534. Anon. 2 P. Wms. 283. *Moore v. Moore*, 2 Ves. 284. 598.

(b) *Ib.*

(c) *Earl of Carlisle v. Globe*, Nels. 52. S. C. 3 Ch. Rep. 94. Gould v. Tancred, 2 Atk. 534. *Perry v. Phelps*, 17 Ves. 175.

(d) See *Curtis v. Smallbridge*, 2 Freem. 178. Ch. Cas. 43. *Taylor v. Sharp*, 3 P. Wms. 371. *Morris v. Le Neve*, 3 Atk. 35. (g) See *Standish v. Radley*, 2 Atk. 177. S. C. Barn. 463.; and see *Gartside v. Itherwood*, 2 Dick. 814.

(h) *Mellish v. Williams*, 1 Vern. 166. *O'Brien v. O'Connor*, 2 Ball and Beatty, 154. *Sed vid. Bonham v. Newcomb*, 1 Vern. 216. *Bread v. Bread*, [b. 214.

(e) See *Chaworth v. Beech*, 4 Ves. p. 564.

(f) See *Young and Keighley*, 16

the decree, may be a ground for an appeal, but not for a bill of review.(i)

In the time of Lord *Guildford*, there was no limitation for a bill of review;(k) but now, twenty years after a decree, (not the enrolment,) though error be apparent on the record, the court will not allow a bill of review;(l) unless in favour of infants, or persons under the disabilities specified in the statutes of limitation.(m)

A person is not allowed to bring a bill of review, unless he has performed the decree, or will swear he is unable to do it, and will surrender *himself to the fleet, to lie there till the matter on the bill of review is determined;(n) but a plaintiff has been allowed to bring a bill of review without paying the costs decreed in the original cause, where the defendant had been in possession of the estate in dispute twenty years.(o)

With respect to *new matter*, it must be shown to be relevant;(p) but the construction has not been so strict as that the new proof must not come to the party's knowledge till after the cause has been heard: it is sufficient, if it did not come to their knowledge till after *publication*, or when, by the rules of the court, the party could not make use of it. But if it came to the knowledge of the party's *attorney, solicitor, or agent*, before the cause was heard, it is considered as notice to the party.(q) Lord *Bacon's* rule has never been departed from.(r) This rule has these words: "in case such new matter came to the knowledge of the party *after the decree*, and could not have been made use of in the cause at the time of the decree made." They are dark in themselves, but a construction has been put upon them; that is, "that came to the knowledge of the party *after publication passed*."(s)

(i) *O'Brien v. O'Connor*, 2 Ball and Beatty, 154.

(k) *Fitton v. Macclesfield*, 1 Vern. 287.

(l) *Edwards v. Carrol*, 5 Bro. P. C. 466. *Smith v. Clay*, Ambl. 645.; but more full, 3 Bro. C. C. 639.

(m) *Lytton against Lytton*, 4 Bro. C. C. 458.

(n) *Williams v. Mellish*, 1 Vern. 117.

(o) *Fitton v. Macclesfield*, 1 Vern. 264.

(p) *Bennet v. Lee*, 2 Atk. 529.

(q) *Morris v. Le Neve*, 3 Atk. 35.; and see *Standish v. Radley*, 2 Atk. 179. *Lord Portsmouth v. Lord Effingham*, 1 Ves. 434.

(r) 3 Atk. 25.

(s) *Patterson against Slaughter*, Ambl. 293.

The new matter must appear to be relevant; *but it is sufficient if there be a probable cause of relevancy.(t)

When a *bill of review* is brought for *error apparent*, the constant method is for the defendant to put in a plea and demurrer; a plea of the decree, and a demurrer against opening the enrolment.(u)

A bill of review, upon new matter discovered, has been permitted even after an affirmance of the decree in parliament; but it may be doubted whether a bill of review upon error in the decree itself can be brought after an affirmance in parliament.(v) or even whether an application can be made for leave to file a bill of review, while an appeal is depending in the house of lords.(w)

A bill of review, upon discovery of new matter, has been allowed after two trials, and a decree to establish the will; and another trial has been ordered, and, on a verdict for the heir at law, the former decree has been reversed.(x)

If a man has less decreed him than he thinks himself entitled to, he cannot bring a bill of review; for a bill of review lies only for him against whom the decree or dismissal is.(y)

A bill of review does not lie after a demurrer to a former bill of review allowed.(z)

*413 *If a report is deficient, the defect cannot be cured upon a *bill of review*.(a)

A bill of review states the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself to be aggrieved by it; and the ground of law, or new matter discovered, upon which he seeks to impeach it: and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it, and the fact of the discovery, though it may be doubted whether, after leave given to file the bill, that fact is traversable. The bill may pray, simply, that the decree may

(t) Lord Portsmouth v. Lord Effingham, 1 Ves. 435.

(u) Gould v. Tancred, 2 Atk. 634.

(v) Mitf. Plead. 79.

(w) Willan v. Willan, 16 Ves. p. 89.

(x) Attorney General against Turner, Ambler, 587.

(y) Glover and Portington, 2 Freeman. 182, 183. Ch. Cas. 51.

(z) Dunay v. Filmore, 1 Vera. 135. S. C. 2 Ch. Rep. 64. Nels. Ch. Rep. 64.

(a) Perry and Phelps, 17 Ves. 183.

See vid. Worge v. Bradley, 2 Dick. 670.

be reviewed, and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. (b)

Costs.

By the 17 Ed. II. cap. 6. a power was given to the chancellor, in case writs appeared to him to be grounded upon untrue suggestions, *to give damages according to his discretion*; and by the 15th of Hen. VI. ch. 4. no subpoena was to be granted till security was found to satisfy the defendant his damages, if the bill was not verified; (c) but that is not now the course of the court. *414

We have already observed, (d) it was also the ancient course of the court in cases of *notorious frauds* to make the defendant pay *exemplary costs*; but it has been disused for some time, from the difficulty of carrying it into execution. (e)

No man, either in the *courts of equity*, or the *common law courts*, subjects himself to an action by *merely suing*, whether in a criminal or civil form, however unfounded the suit may be: nor is he otherwise punishable, except in the case of a civil suit, by the payment of costs. If, however, a suit in the common law courts be malicious and false, it is on that account punishable, on an indictment or information, by fine and imprisonment, and defendants are punishable for misbehaviour by fine and imprisonment; (f) but there does not appear to be any instance of a prosecution for maliciously and falsely instituting a suit in equity.

If a man's name stands upon the record down to the hearing without his knowing it, (a case hardly conceivable,) he must pay costs, if the bill is dismissed with costs, and must get his costs from the solicitor. (g)

(b) Mitf. Plead. 89, 81.

(c) Waltham v. Broughton, 2 Atk.

(e) Vid. 4 Inst. 82. 1 vol. Harg. Law 43.

Tracts, p. 332.

(f) Vid. Har. Co. Lit. 161. a. a. n. 4.

(d) Ante, 1 vol. p. 304.

(g) Dundas v. Dutens, 1 Ves. jun. 200.

We have already observed upon costs in cases *where the surrender of a copyhold is supplied;(h) and in cases of interpleading bills;(i) bills to perpetuate testimony;(k) bills of discovery;(l) bills for partition;(m) and on other subjects, they have been incidentally alluded to.

Costs are entirely in the discretion of the court,(n) and are given, not from any authority, but from conscience, and *arbitrio boni viri*, according to "a sound discretion," as it hath been called.(o) As the chancellor has a discretion as to the giving of costs, he often uses this discretion, by giving them *on such terms* as the justice of the case may require. The reports abound with cases where costs appear to have been given upon terms, but it is useless to quote any of them. Sometimes the costs of *part* of the proceedings are given, and denied as to the rest.(p)

But the exercise of this *discretionary* authority is every day in some degree diminished, by the wise rules that are laid down upon the subject.

In equity, as at law, costs usually follow the justice of the demand,(q) and, *prima facie*, the party who fails pays costs, and it depends on such party to show the existence of circumstances in a sufficient degree to displace the *prima facie* claim of costs.(r)

*416 *"It would be," says Lord Eldon, "a most satisfactory doctrine, if I was at liberty to say, that, in any species of suit, the rule that prevails universally at law, that the costs shall abide the event, was established in equity; for, frequently, the most painful and anxious duty of a judge in this court, is to execute well the judgment as to costs, depending more upon discretion than the merits; with reference to which, the rules of law and the principles of equity guide you with much more certainty."(s)

(A) Ante, 1 vol. p. 59.

(i) Ib. 148.

(k) Ib. 160.

(l) Ib. 76.

(m) Ante, vol. 1. p. 201.

(n) Jones v. Coxeter, 2 Atk. 399. White v. Foljambe, 11 Ves. 337. Bennett Coll. against Carey, 3 Bro. C. C. 390.

(o) 7 Ves. 29.; and see Corporation of Burford v. Lenthall, 2 Atk. 551.

(p) See 5 Ves. 279.

(q) 2 Atk. 113.

(r) Vancouver v. Bliss, 1 Ves. 463.

(s) White v. Foljambe, 11 Ves. 337. Roberts v. Kiffin, 2 Atk. 113.

(t) Vancouver v. Bliss, 11 Ves. 463.

It is in many cases hard that costs should follow the event of a cause, yet (says the same great judge) "all my experience has persuaded me, that it is much to be wished that the course of the court was so. Certainly, however, that is not the present course of the court; where there is a fair case for consideration, it is not the course to visit the party who fails with costs."^(s)

In the *eschequer*, it is said, the plaintiffs are entitled to their costs in equity, where they recover, without any order for them.^(t)

The rule of the court is never to give costs, but where there appears to have been no just grounds for the proceedings.^(u) Where, therefore, it appears a plaintiff has the *dicta* of several judges in his favour, the court will not give costs against him.^(v)

In all those cases where an attorney has taken *a gift from *417 his client, and no *third* person has been interposed, and a bill is filed to examine the transaction, costs, says Lord Eldon, *never ought to be given upon the result of that examination.*^(w)

By the stat. 4 Anne, c. 16. sec. 23. full costs, to be taxed, are given in all cases where a plaintiff dismisses his own bill, or it is dismissed for want of prosecution.

If a bill is dismissed with costs, and the costs are levied, and afterwards the cause is reheard, and the former decree reversed, the costs must be refunded. So, if an order for the allowance of a demurrer is *reversed*, the costs must be *refunded.*^(x)

Where a plaintiff is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is considered as an aggravation, and the bill, if dismissed, will be so with costs.^(y)

Where a cause is set down on *bill and answer* only, or where it is so set down after withdrawing a replication,^(z) it is discretionary in the court to dismiss with *forty shillings costs*, or *costs to be taxed*, or with *no costs*;^(a) and though it is the common course of the court to give only *forty shillings costs*, upon the dismis-

(s) *Staines v. Morris*, 18 Ves. 16.

(x) *Oates v. Chapman*, 1 Ves. 100.

(t) *Warburton v. Warburton*, Vin. Abr. tit. Costs (a) Cas. 3.

(y) *Biggton v. Grubb*, 2 Atk. 48.

(z) See 2 Atk. 288.

(u) *Anon.* 3 Atk. 234.

(a) See *Ordo Curiae*, 27th April,

(v) *Perry v. Whitehead*, 6 Ves. 54.

1749. 2 Atk. 289.

(w) *Harris v. Tremenhare*, 15 Ves.

sion of a suit heard on bill and answer, (b) yet if a special case be made, (c) if the party, for instance, has acted *cautiously*, full costs will be given. (d)

- 18 *Where a cause is set down to be heard on bill and answer, and the court, not thinking the answer full enough, *directs an issue* on the merits, (e) or *makes a reference* to the master, (f) or if an act is required to be done by the defendant, (g) this is not hearing a cause upon bill and answer only, but a subsequent proceeding, and, therefore, out of the rule of dismissal with forty shillings costs.

Whenever a bill is *in part* dismissed, being right in one point and wrong in another, the decree is usually without costs; (h) and a bill may altogether be dismissed without costs, (i) or with costs to be paid by relators; (k) but it has been held that, if a bill is dismissed, the court cannot give the plaintiff his costs. (l)

If several defendants in a cause are entitled to a fund in equal shares, and long inquiries are necessary as to one share only, a direction will be given that each share should bear its own costs. (m)

- *419 It seems, that if a suit is brought in equity, and dismissed with costs, and an action is brought at law on the same account, and damages are recovered, *the costs of the suit in equity may be deducted out of the costs at law. (a) The court, however, will not upon motion discharge a person in execution for costs upon a demand arising to him from the person to whom he is in execution. (b)

If there be any oversight or mistake in the bill, which requires amendment *before* the defendant's appearance, it may be

(b) Anon. 2 P. Wms. 387.

(c) Bayley v. Corporation of Leominster, 1 Ves. jun. 476.

(d) Mansel against Bowles, 1 Bro. C. C. 403. Johnson v. Brown, 3 Atk. 1.

(e) Newsham v. Grey, 2 Atk. 286.

(f) Ib. 287.

(g) See Sutton v. Stone, 2 Atk. 101.

(h) Mackreth v. Symonds, 15 Ves. p. 354.

(i) It was so done in Priestley and Wilkinson, 1 Ves. jun. 214. M'Leod

and Drummond, 14 Ves. 363. Wheldale v. Partridge, 5 Ves. 498. Lloyd and Johnes, 9 Ves. 67; and see 13 Ves. 260. and 11 Ves. 550.

(k) 1 Atk. 356.

(l) Cooth v. Jackson, 6 Ves. 41. Lile v. Airey, 1 Ves. jun. 278.; but see Bennett Coll. against Casey, 3 Bro. C. C. 390.

(m) Basevi v. Serra, 14 Ves. 317.

(a) Gunish v. Donovan, 2 Atk. 166.

(b) Holworthy against Allen, 2 Bro. C. C. 17.

amended upon motion, without paying costs; but if it be amended after appearance, costs must be paid.(e)

A *prochein amy* has, on petition, been allowed costs, although the infant's bill was dismissed with costs;(d) but costs beyond the taxed costs will not be allowed to a *prochein amy*.(e)

If an infant by *prochein amy* brings a bill, and never stirs in it after he comes of age, and the bill is dismissed, the infant and the *prochein amy* are both liable to costs.(f)

If a bill be referred for scandal and impertinence, and so reported, and exceptions are taken to the report, and allowed, the plaintiff is allowed the costs of the reference; but not if exceptions are allowed to the master's report of irregularity.(g)

By a rule of court, 5*l.* were allowed as costs to be paid on the allowing or overruling a plea or *demurrer; and 5*l.* were directed to be deposited on the re-arguing a plea or demurrer; but by a subsequent order of court(h) it was ordered, that the parties shall, in all such cases, be liable to such further costs as the court shall think fit to award. Where, therefore, a third bill had been filed for the same cause, and a demurrer allowed, full costs were, on motion, ordered;(i) and this, though common costs only had been ordered, on the hearing of the demurrer.

If a demurrer be allowed by a judge sitting for the chancellor, and the order is afterwards reversed, the costs will be ordered to be refunded.(k)

Where a plea of another bill for the same matter was overruled, on a reference to the master, who made a special report, the plaintiff was held not to be entitled to costs.(l)

After a demurrer is set down to be argued, and submitted to, and the bill is amended, the defendant may move to have more

(e) See Eq. Cas. Abr. in marg. p. 29.

(d) *Taner v. Ivie*, 2 Ves. 468.

(e) *Osborne v. Donne*, 7 Ves. 424.

(f) *Turner v. Turner*, 2 P. Wms. 297. S. C. Sel. Cas. 49. 1 Str. 708.; and 2 Eq. Abr. 238.

(g) *Bromfield against Chichester*, Ambler, 464.

(h) 6th February, 1794, 4 Bro. C. C. 545.

(i) *Griffith v. Wood*, 1 Ves. and Beames, p. 307.

(k) *Oates v. Chapman*, 1 Ves. 542.; and see 2 Ves. 100.

(l) *Huggins v. York Buildings Company*, 2 Atk. 44. S. C. Barnard. p. 83.

than the common costs, on account of the expense he has been put to: *5l.* have been allowed.(*m*)

If a defendant disclaims generally, and the plaintiff replies to the answer, and serves a subpoena to rejoin, the defendant is entitled to have costs for the vexation. It is otherwise where the disclaimer is to part, and the answer is as to another part.(*n*)

- *421 *If a feme sole brings a bill, and pending the suit marries, and baron and feme bring a bill of revivor, and obtain a decree with costs, they are entitled to costs for the whole suit, excepting only the costs of the bill of revivor.(*o*)

When a cause is brought to a hearing upon the equity reserved after trial of an issue, on a particular action directed by the court, the court, if they mean to give the costs at law, especially direct payment of such costs, together with the costs of the suit in chancery.(*p*)

No costs will be given to a *trustee* who has misbehaved ;(*a*) nor will he be allowed costs in respect of a deed impeached for *duress*.(*b*)

If a bill be filed against a trustee for the resale of an estate purchased by him, the court, where *infants* are concerned, gives relief with costs.(*c*) It has been laid down, that wherever interest is given against executors for a breach of trust, costs follow as of course.(*d*)

- Where a bill is filed against an executor for an account, and to answer a breach of trust, it seems he is liable to costs in what regards the *breach of trust* ;(*e*) but not beyond that.(*f*) It is not *an invariable rule that an *administrator* shall be allowed costs at all events.(*g*)

(*m*) Anonymous, 9 Ves. 221.

(*o*) Sanderson and Walker, 13 Ves.

(*n*) Williams v. Longfellow, 3 Atk. 601.

582.

(*e*) Durbaine v. Knight, 1 Vern. 318.

(*d*) Seers and Hind, 1 Ves. jun. 294. ; but see Ashburnham and Thomson, 13

(*p*) Davis v. Lord Brownlow, 2 Dick. 796.

Ves. 404. Sammes v. Rickman, 2 Ves. jun. 36.

(*a*) Lloyd v. Spillet, 3 P. Wms. 347. Haberdashers' Company and Attorney General, Vin. Abr. tit. Costs A. Cas. 3. Dawson v. Parratt, 3 Bro. C. C. 236. ; and see 5 Ves. 128. 6 Ves. 488.

(*e*) Raphael v. Boehm, 13 Ves. 590. ; and see Caffrey and Darby, 6 Ves. 497.

(*f*) *Ib.* ; but see Humphrey v. Morse, 2 Atk. 408.

(*b*) Colman v. Sarrel, 1 Bro. C. C. 55.

(*g*) Wilkins v. Hunt, 2 Atk. 151.

The giving of costs may be reserved generally by the decree, (g) for they are entirely in the discretion of the court; and where they think it would accelerate a decree, the court may postpone the consideration of the costs till the cause comes back from the master, though there might be grounds enough for decreeing costs even at the hearing of the cause; (h) but a plaintiff may apply for costs where a defendant gives unnecessary trouble in carrying a decree into execution. (i)

Where the costs of a trustee are directed to be taxed, that means, as between *party and party*, and not in the larger way. But where a trustee, in the fair execution of his trust, has expended money, by reasonably and properly taking opinions and procuring directions that are necessary for the due execution of his trust, he is entitled not only to his costs, but also to his charges and expenses under the head of *just allowances*. (k) Trustees and executors brought into court are allowed their costs, though they make a claim which fails: but if an *heir at law* is made a defendant, and he raises a point which fails, he will not be allowed his costs. (l)

A mortgagor is *prima facie* entitled to his costs; but there are cases where his conduct has been such, *usurious* for in- *423 stance, (m) or oppressive, (n) or unjust, (o) or where the agreement is fraudulent on the face of it, (p) or where he has made an unjust defence, (q) in which he has not been allowed his costs; and there may be cases, as it seems, (though there is no precedent for it,) where he would be obliged to pay the costs of the mortgagor.

A mortgagor is allowed the costs of procuring administration to an encumbrancer under the will of the mortgagor, as a necessary party to the foreclosure. (r)

Where a bill was filed by the first mortgagee, and a sale directed with the consent of the second and third mortgagee, and

(g) *Shadleton v. Walker*, 13 Ves. 407.

(h) *Searborough v. Dalton* 2 Atk. 111.

(i) *Id.*

(k) *Peart v. Young*, 10 Ves. 14.

(l) *Haskley v. Mansel*, 1 Ves. Jun. 306.

(m) *Bromley v. Hollard*, 7 Ves. 27.

(n) *Dedlin v. Gale*, 7 Ves. 583.

(o) *Mosatta v. Murgatroyd*, 1 P. Wms. 393.

(p) *Moroney v. O'Dea*, 1 Ball and Beatty, 121. and cases *in toto*.

(q) 1 P. Wms. 395.

(r) *Hunt and Fownes*, 9 Ves. 70.

the fund proved deficient, the costs were ordered to be paid in the first place.(s)

Where an executor is a defendant at law, and fails in his defence, he must pay costs *de bonis testatoris, si non, de bonis propriis*, and it is said to be the same in chancery;(t) but the rule seems to be, that in equity it is discretionary whether the court will make an executor pay costs or not.(v)

An executor, though made a defendant by his co-executor, will be allowed his costs.(w)

- *424 *When a bill is brought against the executor and heir at law, for an account of real and personal assets, executors are not allowed their costs, because they may renounce; but it is the law which casts the descent upon the heir, and that differs his case from executors; and if he has accounted justly for such money as is to come to his hands, it entitles him to costs.(x)

It is a settled rule that the executors of an insolvent shall not have costs; they need not have administered.(y)

If an executor commits a *fraud*, he will not be allowed costs out of the estate, though the testator has directed, that, for any expenses the executor might be at, he shall be allowed his costs out of the estate; for he could never mean to save him harmless when he has been guilty of a *fraud*.(z)

It seems, that if an executor on a bill filed against him *denies assets*, he will, if it appears there are assets, be obliged to pay costs out of his own pocket; but if the accounts are of such a nature that make it impossible to say whether or not there are assets, he will be allowed to retain his costs out of the estate.(a)

Where relief is given on a bill filed on grounds of *public policy*, costs are usually given, the relief being not on account of the individual, but the public.(b)

- *425 *Where an information is filed to remedy a breach of trust,

(s) *Kenebel v. Scrafton*, 13 Ves. 370.

(t) *Jefferies v. Harrison*, 1 Atk. 468.
Sed qu. see *Humphreys v. Moore*, 2 Atk. 108.

(v) *Uvedale v. Uvedale*, 3 Atk. 119.

(w) *Blount v. Barrow*, 3 Bro. C. C. 95.

(x) *Humphreys v. Moore*, 3 Atk. 468.
and see *Uvedale v. Uvedale*, 3 Atk. 119.

(y) *Adair v. Shaw*, 1 Sch. and Lefr. 230.

(z) *Hide v. Hetwood*, 2 Atk. 128.

(a) *Sandys v. Watson*, 2 Atk. 79.

(b) *Jackman v. Mitchell*, 13 Ves. 586.

by granting long leases of charity estate, the relief will be given with costs.

If there be a decree for an account of *tithes*, it is always with costs, unless there has been a *tender*.(c)

It is the constant course of the court, where a mutual account is decreed, to reserve the costs until after the report, that the court may have it in their power to punish the wrong doer.(d)

Costs usually follow the event of the account; but if it be intricate or doubtful, no costs will be given.(e)

The plaintiff always pays costs where an account turns against him, or where he prevails in nothing but what he might have insisted upon at law.(f)

If a commission issue for the examination of witnesses abroad, a solicitor attending the execution of the commission will not be allowed his costs.(g)

Where money was found due to the defendant upon account, but much less than had been claimed by the defendant's answer, the defendant was not allowed his costs.(h)

The general personal estate not specifically disposed of is first to be applied to the costs,(i) and then as to the *legacies*; and the specific legatee is only to contribute as far as the costs occasioned by the inquiry as to his specific legacy.(k) *426.

Where a question arises between an individual, and the person taking the bulk of the estate, how far the bulk of the estate is to answer for a legacy,(l) a sum of money, or a portion, costs are paid out of the estate,(m) but where the bulk of the property is handed over, and a question arises as to the right to property clearly severed from the bulk of the property, the expense of questions touching such fund must be borne by the fund itself.(n)

Wherever a testator by his will raises a doubt upon the

(c) *Stockwell v. Terry*, 1 Ves. 118.

(d) *Rider v. Bayley*, Vin. Abr. tit. 549, 550.

Costs, (B) Ca. 32.

(e) *Pitts and Page*, Ib. Cas. 11.

(f) *Lyre and Parnel*, Ib. Ca. 23.

(g) *Hamond v. Wordsworth*, 1 Dick. 381.

(h) *Attorney General v. Brewers' Company*, 1 P. Wms. 376.

(i) See *How v. Chapman*, 4 Ves.

549, 550.

(k) *Barton v. Cooke*, 5 Ves. 484.

(l) *Baugh against Reed*, 3 Bro. C. C. 196.

(m) *Tenour v. Tenour*, 10 Ves. 571; and see *Wilson v. Brownsmith*, 9 Ves.

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(n) *Tenour v. Tenour*, 10 Ves. 571, 572.

meaning of it, his general property pays for settling that doubt.(o)

In a cause between relations, contesting the effect of a will, costs are often given out of the estate, and as between *attorney* and *client*.(p)

Where an heir at law is made a defendant, and insists on his title, he is entitled to his costs, though he fails; but if an heir at law is plaintiff, and he fails, he will not have his costs, but if the suit be groundless he will pay them;(q) but where an heir
 *427 at law, or the heir male to the honour of a family, has a probable cause to contend for the family estate, he will not be made to pay costs.(r)

Where a bill is filed to establish a will, and the *heir at law*, a defendant, desires an issue, and fails, he is entitled to his costs in equity;(s) but no costs will be given on either side as to the issue; and the heir at law has been made to pay the costs of a groundless motion for a new trial.(t)

Where an heir at law is brought by order before the court, he is entitled to costs.(v)

Costs are always allowed where the facts contested are presumed to be in the knowledge of the party that contests them.(w)

If a defendant not confessing the plaintiff's title puts him to the expense and trouble of proving it, it is a circumstance to give costs.(x)

Where a specific performance of an agreement at a great undervalue is enforced, costs are not given.(y)

Where a bill for specific performance is dismissed, on the ground of *misrepresentation*, it will be with costs.(z)

On bills for a specific performance of an agreement to purchase an estate, the court has thought it imprudent to give the defendant costs, though there may have been reasonable and

(q) *Barrington v. Tristram*, 6 Ves.

349. *Jolliffe against East*, 3 Bro. C. C.

25. *Pearson v. Pearson*, 1 Sch. and

Leifr. p. 12; and see 3 F. Wms. 303.

(r) *Moggridge v. Thackwell*, 1 Ves.

jun. 475.

(s) *Linton v. Stephens*, 3 F. Wms.

373.

(t) 1 F. Wms. 424.

(v) *Webb v. Claverden*, 2 Atk. 424.

(f) *White v. Wilson*, 12 Ves. 37.

(g) *Attorney General v. Toppa*, 4

Bro. C. C. 178.

(w) *Cockrairie and Blantire*, Vin.

Abr. tit. Costs (Q.) Cas. 20.

(x) *Trinity House and Ryall*, Vin.

Abr. tit. Costs (Q.) Cas. 22.

(y) *Berronghe v. Lech*, 10 Ves. 476.

(z) *Buxton v. Lister*, 3 Atk. 397.

*weighty objections to the title; because, to give costs, is to injure that title he is compelled to take, and in such case the court has decreed a specific performance *without costs*.(y)

Where a party has not been able to make his title before the decree, it is always a question very important to the costs.(z)

Where tenant by *eligit* has received rents and profits beyond the debt, though he shall account for the debt, yet he will not be made to pay costs.(a)

Governors of a charity, though they gain nothing, nor are guilty of corruption, yet, if they have been extremely negligent in their trust, are punishable with costs.(b)

In cases of charity, relators have often costs allowed them beyond the taxed costs;(c) and in suits upon questions relative to *charitable* legacies, costs are frequently given to the heir, as between attorney and client; the heir not making an improper point.(d)

It has been determined upon the construction of the statute of charitable uses, 43 Eliz. c. 4., that commissioners have not power to give costs; but the chancellor can, and has given costs, upon exceptions taken, to a decree of *charitable uses*; but the ground upon which he has a right to do so is not very clear.(e)

*So, in cases of *bankruptcy*, he can give costs, though nothing *429 in the bankrupt acts seem to authorize him.

It is the same as to costs under commissions of *lunacy*; the foundation of the right is not very discernible.(f)

Costs, it seems, are not given on a bill of review;(g) and, on a *bill of review* for error, the costs are of course, if there be no error in the decree.(h)

It seems that no more costs will be given to a *pauper* beyond the costs actually out of pocket.(i)

(y) *McQueen v. Farquhar*, 11 Ves. 492. see *Corporation of Burford v. Lenthall*, 2 Atk. 552, 3, 4.

(z) *Seton v. Slade*, 7 Ves. 279.

(a) *Cary v. Stafford*, Ambli. 520.

(b) *East v. Ryal*, 2 P. Wms. 234.; and see 3 P. Wms. 146. note (a.)

(c) *Osborne v. Denn*, 7 Ves. 424.

(d) *Carrie v. Pye*, 17 Ves. 468.

(e) *Ayllett v. Dodd*, 2 Atk. 233.; and

(f) See *Corporation of Burford v. Lenthall*, 2 Atk. 552, 3, 4.

(g) *Jackson and Eyre*, 2 Freem. 181; S. C. 3 Ch. Rep. 15.

(h) *Bolger v. Mackell*, 5 Ves. 509.

(i) *Froat and Preston*, 16 Ves. 180.

S. C. MS.; and see *Denn v. Russell*, 1 Dick. 427.

The costs of impertinence, expunged from the answer of a pauper, have been ordered to be taxed as *divers* costs, to be paid into court, and await the event of the cause in its further progress. The court has a discretion in each case.(i)

A *pauper* cannot dismiss his bill without costs.(k)

Costs have been given personally against an *uncertificated bankrupt*, in a case of fraud and misconduct.(l)

*430 Where persons apply to set aside an annuity, if they have taken their chance as long as it is *good for them, they will not be permitted to set it aside without costs.(m)

There is hardly a case of a bond set aside for fraud or improper consideration, but it ought to be with costs.(n)

But in cases of gross fraud, the court will sometimes give costs, to be ascertained by the party's own oath.(o)

Where *fraud* is *charged*, but not *proved*, it seems, the court will give the defendant costs.(p)

Where a *feme covert* has been guilty of a fraud solely without the husband, and he has no benefit from it, he will not be obliged to pay costs.(q)

Where a widow files a bill for the single purpose of having dower assigned her, costs do not follow the suit; but where, in bills for dower, separate questions of title arise, and are conducted vexatiously,(r) or where the widow has, without any just pretence, been vexatiously kept out of her dower, she will be allowed her costs.(s)

If a party unconscientiously obtains a judgment at law, and a bill of discovery is afterwards brought, the defendant pays the costs of both proceedings; but if the discovery is obtained *431 *before the expenses at law are incurred, the defendant gets his costs.

Where a bill is for a discovery, and a commission is prayed for the examination of witnesses abroad, if both parties have had

(i) Rattray v. George, 16 Ves. 234.

(p) The Mayor, &c. of Colchester v.

(k) Pearson against Belsher, 3 Bro. C. C. 87.

Lowten, 1 Ves. and Bea. 248.

(l) Lock v. Bromley, 3 Ves. 40.

(q) Cotton v. Lutterell, 1 Atk. 453.

(m) Duff v. Atkinson, 8 Ves. 584.

(r) Lucas v. Calcraft, 1 Bro. C. C.

(n) Debenham v. Ox, 1 Ves. 277.

134. and S. C. from Sir Samuel Romilly's note, 18 Ves. 20. n. a.

(o) Dyer v. Timewell, 2 Vern. 123.

(s) Worgan v. Ryder, 18 Ves. 20.

the benefit of the commission to examine witnesses, each pays his own costs as to that part.(t)

We shall now observe upon the *taxation* of costs, and on the *lien* of attorneys.

Where *any part* of a solicitor's bill relates to business done in the court of chancery, *the whole* may be taxed, although part of the business was for other persons jointly with the person applying.(u)

Formerly, solicitors' bills would not be ordered to be taxed, unless the whole demand was brought into court; but the act of parliament varied the rule, and enabled the client to have the bill taxed, upon submitting to pay what should appear to be due.(v)

Agency business does not come within the act of parliament as to the taxing of costs.(w)

If a bill of costs has been settled and paid, and the payment has been acquiesced in, the court will not refer such bill to be taxed as a *matter of course*. The general rule is, that an attorney's bill which has been delivered according to the statute, for the purpose of creating a capacity of bringing an action, cannot be taxed at the trial, or after verdict; but, under special *cir- *432 cumstances, the court will refer it to be taxed, if it is shown by affidavit, that the business has not been done, or, that the charges are fraudulent; and neither payment of the money, nor a release, nor a judgment for the demand, will preclude taxation in such a case.(x) Nor, in general, can accounts be taken on the taxation of a bill; for the court will not stop the payment to have the accounts taken.(y)

An order for taxing a bill of costs, entitled in the cause, if obtained by a party in the cause, is regular under the general jurisdiction; but a person, not a party in the cause, must apply *ex parte* under the statute, (2 Geo. III. c. 23. s. 22.)(z). A party in the cause may make a motion in the cause: whether he

(t) *London Assurance Company v. Hankey*, 1 Amtr. 9.

(u) *Margerum against Sandilford*, 3 Bro. C. C. 233.

(v) See Anon. 2 Ves. 451.

(w) *Binstead v. Barefoot*, 1 Dick. 112.

(x) *Langstaff v. Taylor*, 14 Ves. 263.

(y) Anon. 2 Ves. 451.

(z) *Bignot v. Bignot*, 11 Ves. 328.

may afterwards pursue it under the statute may be questionable.(a)

On the taxation of costs, the court cannot, on account of improper conduct, make the attorney pay the costs of the taxation, but only where there are *improper items* in the bill, amounting to a sixth.(b)

Where an attorney has been seven years without getting his bills taxed, after an order so to do, and they are lost in the mean time, in the master's office, the court will not allow it to go again to the master.(c)

A representative of a person who had obtained an order to
*433 tax a bill can revive it only on an *undertaking to pay. To bring a defendant into contempt on an order of taxation, it is necessary to leave a copy at his house, and the report of the sum at which the bill is taxed.

If a solicitor declines proceeding in a suit, (whatever his reasons,) and does not carry the business through to a hearing, he loses his lien on the fund in court.(d)

It has been held that a *solicitor* undertaking to bring an action, or do any business, part of the undertaking is, that he shall faithfully and honestly bring that business to a conclusion, and, if he fails in that, he cannot bring an action for any thing.(e)

It seems, that where different demands arise in a cause, the costs may be arranged as the equities between the parties require, without considering the solicitor,(f) provided it be fairly and honestly done.(g) A mere voluntary release(h) or settlement is not sufficient.(i)

Where there are costs in equity and at law due from the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter.(k)

*434 *At law*, a party cannot change his attorney *without a judge's order; and the court takes care that the papers shall not be ta-

(a) Ib. p. 329.

(b) *Yea v. Yea*, 2 Anstr. 484.

(c) Ib.

(d) *Creswell v. Byron*, 14 Ves. 272.

(e) Vid. Observations in Bankruptcy,
6 Ves. p. 2.

(f) *Taylor v. Fopham*, 15 Ves. 79.

sed vid. S. C. 13 Ves. 59. before Lord
Erskine.

(g) Anon. 1 Ves. 25, 6.

(h) *Id.* 28.

(i) *Fairland v. Enever*, 1 Dick. 114.

(k) *Smith and Brocklesby*, 1 Anstr.

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ken out of his hands, without doing that justice which his lien gives him : but it is not so in chancery, for there, at his option, he may discharge his attorney, and proceed if he can without his papers ; but he cannot take his papers out of the hands of the solicitor without paying his bill.(l)

A bill filed by an attorney for costs is not sustainable, and may be demurred to ; for he should proceed, either by action at law, or apply to a court of equity,(m) in a summary way, according to the statute.(n)

Solicitors have a lien on the fund in court for their expenses, whether in the way of *suit*, or prosecution in *lunacy* or *bankruptcy*.(o)

A client in the country, who employs a country solicitor, is not liable to the agent in town ;(p) but the agent in town has a lien upon the papers in his hands for what was due to him, as *agent in the cause*, from the solicitor in the country ;(q) but not, it seems, for money lent to the solicitor.(r)

The court of *king's bench* has held that the equity of set-off shall not interfere with the solicitor's lien : the court of *common pleas*, on the *contrary, hold, that the attorney can have no lien *435 that will interfere with the equity between the parties ; and, in *chancery*, the court does not interpose the lien farther than upon the clear balance, which is the result of the equity between the parties.

A *six clerk* is not obliged to deliver papers to the plaintiff till his fees are paid, though the plaintiff had paid his solicitor, who had satisfied his clerk in court his whole bill.(s)

A party may be restrained from paying any part of the bill of fees, &c. due to his solicitor, until the clerk in court employed by him in the cause is fully paid.(t)

A solicitor procuring a decree has a lien for his bill on the estate recovered, in the hands of the person recovering, but not

(l) *Twort v. Dayrell*, 13 Ves. 195. ; and see *Merryweather v. Mellish*, 13 Ves. 161. *O'Dea v. O'Dea*, 1 Sch. and Lefr. 315, 316.

(m) *Parry v. Owen*, Amb. 109. contra, *Raneleigh v. Thornhill*, 1 Vern. 203. S. C. 2 Ch. Cas. 153. *Norris v. Bacon*, 1 Vern. 312.

(n) 2 Geo. II. cap. 23.

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(o) *Ex parte Price*, 2 Ves. 407.

(p) *Farewell v. Coker*, 2 P. Wms. 460.

(q) *Ward v. Kepple*, 15 Ves. 297. Ib. 2 P. Wms. 461.

(r) *Grey v. Cockeril*, 2 Atk. 114.

(s) *Taylor v. Lewis*, 3 Atk. 727.

(t) *Stevens v. Averey*, 1 Dick. 224. and the cases there mentioned.

in the hands of the heir, *(u)* unless costs are decreed out of an estate, in which case they are held to be a lien upon it, though the party to whom they are awarded died; *(v)* and payable, even as against the bond creditors of the deceased. *(w)*

Appeal.

An appeal is either to the *chancellor*, or, from the judgment of the chancellor, to the *house of lords*. When an appeal is considered as necessary, *a *caveat* must be entered against the signing and enrolling the decree, which stays the same for twenty-eight days from the presenting the decree to the chancellor.

After the restoration, few points were debated with more zeal and inquiry, than what related to *original* and *appellant* jurisdiction in parliament. *(a)* The *appellant* jurisdiction, however, is now fully acknowledged, and is considered as the most important in its consequences to the whole administration of justice in all the three parts of the united kingdom, and designed to keep all other jurisdictions in due obedience to the laws of the several countries to which they respectively belong, and to render the system of laws administered to the people in each country uniform and consistent in itself, that all those tribunals may know what are the laws by which they are bound, and that the legislature alone may make laws. *(b)*

There may be two hearings at the rolls, and a hearing afterwards upon appeal, before the lord chancellor. *(c)*

Even in the case of creditors coming before the master, *(d)* *437 they have been held entitled to rehear the cause, though not parties, because the decree affected their interests. *(e)*

In like manner, an appeal may be made from the decision of

(u) Barnsley against Powell, Amb. 102.

(v) Blower v. Meyrick, cited in Morgan v. Scudamore, 3 Ves. 197.

(w) Tarwin v. Gibson, 3 Atk. 730.

(a) The subject is ably considered by Mr. Hargrave, in his learned preface to Sir Matthew Hale's Jurisdiction of the Lords' House of Parliament.

(b) Vid. Lord Redesdale's observa-

tions, occasioned by a pamphlet entitled *Objections to the Project of creating a Vice-Chancellor of England*, p. 5, 6.

(c) Browne and Higgs, 8 Ves. 597. and case mentioned in note to Omerod v. Hardman, 6 Ves. 225.

(d) Giffard v. Host, 1 Sch. and Lefr. 409. Osborne and Usher, 2 Bro. P. C. 314.

(e) 1 Sch. and Lefr. 409.

the vice-chancellor at Lancaster, to the chancellor of the duchy court of Westminster.(f)

An appeal will not lie to the chancellor from a decree of a court of equity in a *county palatine* ;(g) though Lord Keeper *North* at first seems to have thought it would.(h)

Appeals lie to the chancellor, from the *great sessions* in *Wales*.(k) So, from the lord mayor's court.(l)

A petition of appeal from the rolls may be *withdrawn*, upon a motion for that purpose and a consent.(m)

By an order of the house of lords, an appeal to that house must be made within fifteen days after a decree *pronounced*, if pronounced *during the session*.(n)

The court guards against any abuse of the right to rehear or appeal, not only by using its discretion as to costs, but also by requiring the signature of counsel.(o) The appellant must, within **eight* days after his appeal is received, give security to the clerk of the parliament by recognisance, in the penalty of 200*l.*, to pay such costs to the defendant in the appeal as the court shall direct, in case the decree be affirmed.(p) *438

When the appeal is lodged and read in the house, the defendant is ordered to have a copy, and required to put in an answer to the same by a particular day. If no answer is put in by that time, a peremptory day is fixed.(q) If the session expires before such peremptory day, and no answer is put in before the end of the session, service of the order upon the respondents, five weeks before the first day of the next session, is good service, and the appellant may apply for a peremptory day for putting in the answer, if the respondents shall not put in their answer within three days from the first day of the next session.(r)

If a tenant in tail, party to a suit, dies, leaving issue, the issue

(f) *Omerod v. Hardman*, 5 Ves. 725. See reporter's note to *Addison v. Hindmarsh*, 1 Vern. 442.; and see *Omerod v. Hardman*, 5 Ves. 725.

(g) *Tennet v. Bishop, and Portington v. Tarbock*, 1 Vern. 184.

(h) *Portington v. Tarbock*, 1 Vern. 177.

(k) *Anon.* 1 Freem. 312.

(l) *Ib.*

(m) *Thompson v. Thompson*, 10 Ves. 30.

(n) *Smith v. Clay*, 3 Bro. C. C. 649. in note.

(o) *Monkhouse v. The Corporation of Bedford*, 17 Ves. 381.

(p) *Lord's Journal*, 27th Jan. 1719: cited Newl. Harr. 349.

(q) *Newl. Harr.* 349.

(r) *Ib.* 349, 350.

may appeal.(s) And if tenant in tail die without issue, a succeeding tenant in tail.(t) or remainder-man, may appeal.

A pauper it is said cannot appeal;(u) and where a decree is made by *consent*, no appeal(v) or rehearing lies; and this, though the party did not really give his consent: his remedy is as against his counsel, &c.;(w) and, it seems, if parties agree
 *439 there *shall be no appeal, and it is made an order of court, the party cannot appeal.(x)

An *appeal* or a *rehearing* will not, in general, lie, in respect of *costs only*;(y) but there is a case in the house of lords, where a decree was reversed as to *costs only*;(z) and Lord *Hardwicke* has said, that, in particular cases, the rule may and has been dispensed with; and in a case where a bill was brought against a tenant by eligit for an account, and costs were given against the defendant, an appeal was allowed in respect of *costs only*;(a) and where the court has, by the decree, applied the fund of the party to a payment to which it ought not to have been applied, by which means no fund remained for payment of costs. in such case an appeal was held to lie, the costs being thus disposed of as matter of relief.(b)

Where the question how costs are to be paid forms part of the relief prayed by the bill, and thus appears on the record, an appeal will lie.(c)

Where a bill is in part dismissed, and, as to other parts, leave is given to proceed at law, within a given time, and the bill is retained in the mean time, and no proceedings take place at law, and the bill is dismissed, the defendant cannot complain of the decree by way of appeal.

*440 Upon a *rehearing* new evidence is admitted,(d) *and, it seems, that, upon an *appeal* from the *rolls*, new evidence may be let

(s) *Osborne and Usher*, 2 Bro. P. C. 314.

(t) *Lloyd v. Johns*, 9 Ves. 56.

(u) *Norcott v. Norcott*, Vin. Abr. tit. Decree.

(v) *Taylor v. Bouchier*, 1 Dick. 504.

(w) *Bradish against Gee*, Amb. 229.

(x) *Buck v. Fawcett*, 3 P. Wms. 242.

(y) *Wirdman v. Kent*, 1 Bro. C. C. 140.

(z) *Husband and Husband*, 7 Bro. P. C. 433. edit. Toml.

(a) *Owen against Griffith*, Amb. 520. S. C. 1 Ves. 250.

(b) *Taylor v. Popham*, 15 Ves. 78.

(c) *Jenour v. Jenour*, 10 Ves. 572.

(d) *Cotterell v. Purchase*, 1 Atk. 390. : and see *Dashwood v. Lord Bulkley*, 10 Ves. 236. *White v. Fumell*, 18 Ves. 153. Amb. 92.

in (e) in which it differs from an appeal to the house of lords, upon which no new evidence is admitted, (f) In one case of an appeal from the rolls, a witness whose evidence was read there put in an answer to a bill, by which it appeared, that, on the day he was examined, the plaintiff gave him a bond, that, if he recovered the land in question, he would convey part of it to the witness; and this answer was allowed to be read on the appeal. (g)

So, if after a hearing a witness is convicted of perjury, the party may take advantage of it, on a rehearing. (h)

In regard to the question of costs, it seems, that if testimony be added upon an appeal to the chancellor, the party, if he succeeds, must indemnify the other for not having that evidence at the time it ought to have been read; (i) and Lord Hardwicke seems to have considered the rule to be, that the appellant must, in such case, give up his deposit. (k)

When the lords vary or reverse a decree of the court of chancery, it is necessary to move to, *make the judgment of the lords *441 a standing order of the court, because it is to be carried into execution in the court of chancery; but, it seems, this is not necessary where the decree is affirmed by consent. (l)

Appeals are not determined by the prorogation, (m) or dissolution (n) of parliament, but continue in the same state they were then in.

Petitions in Causes.

The office of a *cause petition*, is to carry a decree into execution, and therefore, it seems, a defect in a decree cannot be supplied by petition. (a)

Money, to which parties are entitled under a decree, will not

(e) Wright v. Pelling, Prec. Ch. 496.; and see 18 Ves. 153. S. C. Gilb. Eq. Rep. 151. Needham v. Smith, 2 Vern. 463. Sed vid. contra, Thompson and Waller, Prec. Ch. 295. Addison v. Hindmarsh, 1 Vern. 442.; and see what is said in Huddleston v. Briscoe, 11 Ves. 593.

(f) Cuninghame v. Cuninghame, Amb. 90.

(g) Needham v. Smith, 2 Vern. 463.

(h) Ib. 464.

(i) White v. Fussell, 18 Ves. 153.

(k) Hedges v. Cardonall, 2 Atk. 406.

(l) Attorney General v. Scott, 1 Ves. 419, 420.

(m) 1 Ventr. 206. 1 Lev. 165. 2 Lev. 93. Goston v. Sedgwick.

(n) Sir T. Raym. 383, 4. Com. Dig. tit. Parliament, p. 2.

(a) Vid. Bruere v. Pemberton, 12 Ves. 394.; and Cruere v. Howth, 4 Bro. 157. 316. there referred to: and see 6. C. better reported, 2 Ves. jun. 164.

be ordered to be paid out of court *on motion*, but a *petition* in the cause is necessary. *(b)*

A legatee attaining the age at which his legacy was to be paid, may petition to have his share transferred to his *attorney*, if he chooses. *(c)*

The court, on petition, will restrain the payment of moneys decreed to parties, on the application of persons having claims on them. *(d)*

*442 The court will not, on petition, direct money to be paid out to an *infant executrix*, but will refer it to the master to inquire whether there are any debts or legacies, and to consider of a maintenance. *(e)*

An order made on a *petition* (unless it be an *ex parte* petition) cannot be discharged on *motion*. *(f)*

Accountant General.

The office of accountant general was created by statute, *(g)* and is employed in the receipt, placing out, and payment of the suitor's moneys.

The only two cases in which the accountant general ever tries a fact, are, 1st, Where, under an order to pay interest to a single woman, he continues to pay her upon receiving proof of her marriage: 2dly, Where he receives the probate of a will as proof of the death of a party; and upon that pays the representative. *(h)* A *prerogative probate* is necessary, where the sum exceeds thirty pounds; *(i)* and, in general, the accountant general is not authorized in paying money under a provincial administration. *(k)*

In the case of marriage, however, it seems, the accountant general must have not only proof of the marriage, but an affidavit that the interest of the fund is not affected by any *settlement* or *articles*. *(l)*

(b) Lord Shipbrooke v. Lord Hinchinbrooke, 13 Ves. 394.

(c) Hill v. Chapman, 11 Ves. 239.

(d) Duke of Bolton v. Williams, 4 Bro. C. C. 430.

(e) Campart against Campart, 3 Bro. C. C. 195.

(f) Bishop v. Willis, 2 Ves. 113.

(g) 12 Geo. I. c. 32.

(h) Clayton v. Gresham, 10 Ves.

288.

(i) Docker against Horner, 3 Bro. C. C. 240. S. C. 2, Dink. 746.

(k) *Ib.*

(l) 10 Ves. 290.

*Under a decree for payment of debts out of cash in the bank, the accountant general was ordered to pay the executors of a creditor by simple contract under a probate in the diocese where he had resided, without a prerogative probate, the sum being small (sixty-nine pounds thirteen shillings and eightpence) and no *bona notabilia* out of that diocese.(m)

Where an order is made to pay a sum into the hands of the accountant general, he will not receive less than the whole sum, without another order for that purpose.(n)

Where money is directed by an act of parliament to be paid to the accountant general, he is bound by the act to receive it, and the court does not make an order for that purpose.(o)

A person entitled at twenty-one to money invested in stock, in the name of the accountant general, petitioned to receive a dividend only, and to let the money continue in the name of the accountant general; but this the court refused, and ordered him to take the money.(p)

Where money by an order of the court is paid into the accountant general's hands, to be placed in the bank, till it can be laid out according to the directions of a decree, if the party moves for an application of the money, he *must not only have *444 a certificate that the money was paid into the bank, but that it is actually in the bank at the time the motion is made.(q)

We shall now conclude the view of the practice of the court. It is for the most part founded in great wisdom, and is in a constant state of amelioration. That the course of the court is the law of the court, and unalterable, except by the legislature, has been the opinion of many judges;(r) but it must be admitted, that the practice has arrived at its present state with very little assistance from the legislature, and is founded, in a great degree, upon *general orders or regulations*, made from time to

(m) Sweet v. Partridge, 5 Ves. 148.; but see 2 Dick. 748.

(n) Payne v. Collier, 1 Ves. jun. 171. 1 Atk. 445. and what Blackstone says

(o) Anon. 1 Ves. jun. 58. 1 vol. Com. 142.; and Lord Eldon has

(p) Isaac v. Gompertz, 1 Ves. jun. 44. often expressed the same opinion, and Lord Erskine followed him, see 12 Ves.

(q) Anon. 1 Atk. 519. 19.; but see what is said in Tomkin v.

(r) See Lane's case, 2 Co. 16. and Lethbridge, 9 Ves. 178. 463. and in what Mr. J. Powell said on the trial of Ogilvie v. Hearne, 11 Ves. 600.

time by the chancellors, which have always been considered as binding, unless where there has been a continued practice to the contrary, which has been taken to amount to a reversal of an order.^(s)

The observation of Lord *Mansfield* on this subject seems founded in wisdom. "When an *error* is established and has taken root, upon which any *rule of property* depends, it ought to be adhered to by the judges till the legislature thinks proper to alter it, lest the new determination should have a retrospect, and shake many questions already settled; but the reforming *incon-*
 •445 *venient* *points of practice* can have no such bad consequences, and, therefore, they may, by way of general interposition, be altered at pleasure, when found to be absurd or inconvenient."^(t)

It may be urged, that it is dangerous to leave the practice at the discretion of the judge, and that he might partially exercise such a discretion to the injury of the suitor; but the objection is easily answered. If a judge, in a case before him, sees that the existing practice is absurd or inconvenient, his language will be—"In the *present instance*, I shall adhere to the rule, because such has hitherto been the practice, but *in future* the practice shall be altered." Acting in this manner, prospectively and not retrospectively, all injury to the suitor is prevented, and an amelioration of the practice is easily effected. Lord *Thurlow* seems to have coincided with the view which Lord *Mansfield* took of this subject.^(u)

^(s) *Boehm v. De Tartet*, 1 Ves. and Bea. 323.

^(t) 1 Vol. Black. Rep. 264.

^(u) Vid. 4 Bro. 408. 478.; and see lb. 544.

CHAPTER III.

STATUTORY JURISDICTION.

UNDER this head, we shall advert to the jurisdiction exercised by the chancellor in the court of chancery, solely in virtue of acts of parliament giving such jurisdiction. We shall not here notice those acts which have regulated or enlarged the equity jurisdiction of the chancellor, they having been already adverted to in the course of the work. The only jurisdiction which will here be alluded to is that which begins and ends in acts of parliament, and is exercised in the court of chancery.

Admiralty Jurisdiction.

The *admiralty court*, according to the opinion of *Lambard*(a) and *Spelman*,(b) was established in the reign of Edward III. and, it seems, from the recital in the 25 Hen. VIII. c. 19. that if an erroneous judgment was given in the *ordinary court* of the admiralty, usually termed the *instance court*, an appeal lay in ordinary course to the king, in *chancery*, and the chancellor on such appeal appointed, under the great seal, certain *delegates* to review such sentence;(c) and by the 8th of *Eliz. ch. 5., it was *447 enacted, that the decision of these *delegates* appointed by commission, under the *half seal* in *civil* and *marine* causes should be *final*.(d)

The court of chancery, it seems, has an *admiral jurisdiction* under the 31 Hen. VI. No. 68.(e) Until the reign of Hen. VI.

(a) *Lambard*, *Archæon*, p. 41. See 3 T. R. 348. "has always been received also 3 Black. Com. 68. ed with great caution, and frequently contradicted. He seems to have entertained not only a jealousy of, but an

(b) *Gloss*. 13.

(c) See 3 vol. Black. Com. p. 68.

(d) Lord Coke notices this statute in his 4 Inst. p. 134. "This part of Lord Coke's work," says Mr. Justice Buller, alluding to his doctrines as to the court of admiralty, in *Smart* against *Wolfe*,

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enmity against, that jurisdiction."

(e) This act was printed for the first time, I believe, in the late edition of the statutes by Tomlyns and Raithby. In the *King v. Carew*, 1 Vern. 54. Lord

the *admiralty* seems to have had jurisdiction in all matters relating to the main sea; but, in that reign, either through neglect of the admiral, or the evil of the times, occasioning piracies to grow epidemical, the ill government upon the sea became dangerous to the state; it trenching upon the truce made between this and the other nations.(e) To remedy this evil by the 2d Hen. V. c. 6. the *breaking of truce and safe-conducts* was made *high treason*, and a *conservator* of the truce was appointed in every port; with whom two men, learned in the law, were associated; who had power committed to them to punish violators of the truce, both by indictment at the king's suit, and according to the course of the admiralty, by complaint, saving matters of death to the cognizance of the admiral. The branch *448 of the statute concerning high treason *being found to be too severe was afterwards repealed by the 20th Hen. VI. cap. 11.(f) and Nat. Bacon says, that by the 26th of Hen. VI. c. 2.(g) it was provided, "that offenders against the king's truce upon the sea, or in any of the ports, should be proceeded against in the chancery, before the chancellor, who had power given him of calling to his assistance some of the judges to execute the statute of the 2d of Hen. V."(h)

The before-mentioned laws were only *penal*, and made no reparation to the parties aggrieved; and therefore, by the before-mentioned statute of the 31st Hen. VI. in case of injury to the body or goods of aliens in amity, league, or truce, or under safe-conduct, the chancellor has authority, calling to him any of the justices of the one bench or the other, upon a bill or bills of complaint to him made in this behalf, to proceed against the offender, to compel restitution of the body or goods of the alien so injured. And this act was in the subsequent reign of Edward IV. confirmed;(i) but it expressly provided that the act should not extend to any act or ordinance made for the punishment of any such offenders, in the 2d year of king Hen. V. late in *deed*, and not in *right*, king of England.

Letters of reprisal may be repealed in chancery after a peace, *449 though there is a clause in the letters *patent, that no treaty of

Nottingham cites the statute, but says it was not printed.

(e) Nat. Bacon's Hist. Disc. &c. p. 95.

(f) See also 4 Inst. 152.

(g) I do not find that statute, nor, indeed, any statute of that year.

(h) Nat. Bacon's Hist. Disc. &c. p. 96.

(i) By the 14 Edw. IV. c. 4.

peace shall prejudice them.^(k) The case came before Lord *Nottingham*. *Letters of reprisal* were granted to a person of the name of *Courten*, and by the letters patent it was provided that no treaty of peace with the Dutch should prejudice them. After this, peace was made with the Dutch, and in the treaty it was provided that the letters patent should not be prejudicial to the Dutch. The question, therefore, was, whether the king could thus, by treaty, annul or *amortise* the letters patent so granted as before mentioned. The chancellor determined that he could. Lord *Clarendon* concurred in the same opinion, and the decree was, that the *letters patent* were void, that they ought to be resigned, and the record of them erased. Carew, the representative of *Courten*, refused to deliver up the letters patent, and fled to Holland, where he resolved "to eat his bread until the people of England are come to their right wits and senses again." It appears that the opinion of a French lawyer, *Pernott*, was taken on the subject of the *decree* made against Carew, and the opinion of this French gentleman very indignantly arraigns the decree.

14 & 15 *Hen. VIII. c. 2.*

By this act, "concerning the taking of apprentices by strangers," (i. e. aliens,) jurisdiction *is given to the chancellor, *450 upon a bill filed to remedy misconduct towards such aliens in the execution of the act.

25 *Hen. VIII. c. 19. s. 4.*

By this act an appeal is given from the respective courts of the archbishops, to the king in the court of chancery, and upon such appeal a commission is to be directed to such persons as his majesty shall name. This is the court known by the name of the *court of delegates*.

It is discretionary in the chancellor, whether he will grant a *full commission* of delegates, i. e. to judges of the *common law*, *civilians*, and *lords spiritual and temporal*; or to judges and civilians only.

Where the jurisdiction of bishops is in controversy, or any question is depending that concerns the canon and ecclesiasti-

(k) *King v. Carew*, 1 Vern. 54. This very fully given in the Biog. Brit. by case is shortly noticed in Vernon, but is Kippis, 4 vol. 330. in Life of Courten.

cal law, it seems usual to grant a *full commission*, in order to balance the objection of a partiality to one law more than another.

Where it is altogether a *question of law*, it is usual to direct a commission to judges and civilians only. *(l)*

No appeal lies to the house of lords from a sentence by the delegates, *(m)* but it may be reviewed.

The principle to be extracted from the few cases on the subject of commissions of review, is comprehensively expressed in *451 the following *words, used by Lord *Eldon* in a certificate to his majesty, in a case of this kind.

"This commission is prayed of the grace and benignity of the crown. *(n)* Its sound discretion, by which its grace and benignity are guided, has, upon obvious grounds of public expediency, usually induced it to withhold commissions of review, unless there are very cogent reasons for believing that the sentence sought to be reviewed, is founded upon *error in fact*, or *in law*: or unless the doctrines of *law*, upon which the sentence is supposed to be founded, are *so questionable* or *important*, as to make it clearly fit that they should be considered in the most solemn manner."*(o)*

Persons aggrieved by, and interested in, a sentence in the ecclesiastical court, may have a commission of delegates, though not parties to the original suit. *(p)*

Bankruptcy.

All the chancellor's jurisdiction in bankruptcy is derived from the legislature. *(q)* The term *bankrupt* is unknown to the common law.

The first statute on the subject is the 34th & 35th Hen. VIII. *452 c. 4., which gave the chancellor, the *chief justices, and others therein mentioned, an authority to sell and distribute the pro-

(l) Ex parte Hillier, 3 Atk. 708.

(m) Sant v. Wilson, 2 Vern. 118.

(n) See Franklin's case, 2 P. Wms. 299. 4 Inst. 341.

(o) Vid. Eagleton and Coventry v. Kingston, 8 Ves. 481. S. C. MS. where all the cases on the subject are referred to, such as Matthews and Warner, 4 Ves. 186. Ex parte Fearon, 5 Ves. 633.

(p) Jones v. Bougett, 1 Atk. 298.

(q) In Ex parte Lund, 6 Ves. 782, 3., the chancellor is reported to say, that he acted in bankruptcy under a *special commission*: but the chancellor did not mean that, but that he had a *special* authority from the legislature. See 3 Christian's Bank. Law, 2vol. 215.

perty of persons therein described. And by the statute, it is observable, that whatever the rank in life of the debtor was, who had obtained the goods of others, and afterwards fled or kept his house, such person was held subject to the operation of the statute.

That statute was the foundation of all the subsequent statutes in bankruptcy, which are numerous.(r)

This jurisdiction of the chancellor is of the utmost importance, and is subject to no appeal. It is, in the first instance, *ministerial*, and so far original. It is, secondarily, *appellate*; but the original and appellate jurisdictions are frequently blended in exercise. The issuing of commissions of bankruptcy, and all the questions arising upon the issue, are matters of original jurisdiction. The execution of the commission is intrusted to the commissioners, who are assistant judges, given to the chancellor by the authority of parliament, to enable him to execute the bankrupt laws. The commissioners determine, *in *453 the first instance, on every part of the subject subsequent to the issue of the commission, until the close of their proceedings; and the whole business of a bankruptcy may be transacted without further application to the chancellor, until the bankrupt shall apply for an allowance of his certificate. But all the proceedings of the commissioners are liable to revision by the chancellor, and so far his jurisdiction in bankruptcy is appellate. His control is also continual over the commission itself, and over the conduct of the commissioners in its execution, as well as over their judicial decisions. In all cases, his jurisdiction is exercised summarily. It applies to subjects of most important consideration, especially to the commercial world; and, perhaps, the

(r) Such as 13 Edw. c. 7. 1 Jac. I. c. 15. 21 Jac. I. c. 19. 13 and 14 Car. II. c. 24. 4 & 5 Ann. c. 17. expired. 5 Ann. c. 22. expired. 7 Ann. c. 12. 10 Ann. c. 15. 5 Geo. I. c. 24. expired. 7 Geo. I. c. 31. 12 Geo. I. c. 4. 5 Geo. II. c. 30. made perpetual by 37 Geo. III. c. 120. 19 Geo. II. c. 32. 24 Geo. II. c. 57. 4 Geo. III. c. 23. 36 Geo. III. c. 80. 45 Geo. III. c. 124. 46 Geo. III. c. 135. 49 Geo. III. c. 121. The Irish statute, 11 and 12 Geo. III. c. 8., first introduced the bankrupt law into Ireland, and is, with a few exceptions, a consolidation of all the English statutes then in existence. It was prepared by Mr. Hellen, who was then solicitor general in Ireland, and afterwards a judge. The bankrupt statutes, since the union, apply to Ireland as well as to England. See 2 vol. Christian's Bank. Law, p. 207.

chancellor, in the course of every year, decides more important commercial questions than all the other courts in Westminster Hall taken together; many of them of the most complicated nature, requiring nice investigation, great knowledge of law, and that familiarity with the business, which long habit only can acquire.(a)

It is matter of curious inquiry, in what manner the chancellor acquired what is termed his *appellate* jurisdiction in bankruptcy. No statute directly confers it. An able writer considers what *454 is done by the chancellor, under this appellate *jurisdiction, as *recommendatory* only, and not binding on the commissioners, but that the chancellor, by means of his power of changing or displacing commissioners, is thus enabled to enforce his recommendations.(b)

Commission.

The steps preparatory to a commission are these. In the *country*, the person desirous of taking out a commission, who is usually termed the petitioning creditor, swears to the amount of his debt, which must be above one hundred pounds, and that he believes his debtor is become a bankrupt. At the same time, he executes a bond to the great seal, in the penalty of two hundred pounds, conditioned to prove the party a bankrupt. If the petitioning creditor resides in *London*, or in the vicinity, he must make an affidavit before a master in chancery, and execute at the bankrupt's office the bond to the chancellor. When the affidavit and bond are delivered at the office, and an entry is made in the docket book, this constitutes what is termed *striking a docket*. No docket is to be considered as struck, until the same is entered in the docket book.(c)

Two creditors, whose debts amount to one hundred and fifty *455 pounds, or *three* creditors, *whose debts amount to two hundred pounds, may, in like manner, obtain a commission.

(a) Observations occasioned by a pamphlet, entitled, "Objections to the Project of creating a Vice-Chancellor of England," said to be written by Lord Redesdale, p. 50, 51. 213., etc., a work profound, original, and useful. No book so strikingly exhibits the fallibility of judges.

(c) See Lord Erskine's Order, 29th of December, 1806.

(b) Christian's Bankrupt Law, 2 vol.

The affidavit made on suing out the commission must show a true and real debt; but it need not state the debt with the precision of a special pleader, bringing an action on it.(d) Upon the opening of the commission, the commissioners are directed to require the personal appearance of the petitioning creditor, and to examine him concerning the nature and condition of the debt.(e)

If instructions to strike a docket are received from the country on Sunday by a solicitor, who, before the bankrupt office opens on the following morning, receives similar instructions from another client, they must draw lots, as is done upon two applications to the office at the same instant.(f)

By Lord *Apsley's* order,(g) if a docket is struck, and no commission is issued thereon in less than four days, another commission may issue; but a contrary practice had obtained:(h) and by a subsequent general order(i) of Lord *Erskine*, it is ordered, that in case any person striking a docket shall not, within four days next after such docket shall be struck, order a commission to be sealed at the then next public seal, in case there shall be a public seal, within seven days next after such docket shall be struck, or, by a private *seal, within eight days after the striking of such docket, and shall not cause the same to be sealed accordingly, then that any person may be at liberty to sue out a commission without any notice being given to the person who shall first have applied for such commission. *456

The fourth day being a holiday does not prevent the operation of the rule.(k)

By a general order,(l) a commission sued out and to be executed in *London* is supersedable for want of prosecution, at the expiration of fourteen days; and if sued out, and to be executed in the country, is supersedable for want of prosecution, at the expiration of twenty-eight days; but particular circumstan-

(d) *Ex parte Bryant*, 1 Ves. and Bea. 214.

(e) *Cook's Bankrupt Law*, 1 vol. p. 7. 6th edit.

(f) *Hays's Case*, 13 Ves. 197.

(g) 12th February, 1774.

(h) See *Ex parte Leicester*, 8 Ves. 433.

(i) 29th December, 1806.

(k) *Ex parte Cooper*, 12 Ves. 418.

(l) 26th June, 1793, explained by order, 5th Nov. 1793. On the construction of this order, see *ex parte Ellis*, 7 Ves. 135.

ces, it seems, may take the case out of the general order, such as the sickness of a commissioner or a witness; or a witness prevented attending by accident, or where evidence has been kept out of the way, (m) or the solicitor who sued out the second commission was aware that the first was really intended to be prosecuted. (n)

Questions arising out of bankruptcy are very various, and the decisions voluminous, and have engaged the attention of several writers.

It is not consistent with the plan of this work to enter into all the doctrine on this subject, but only to treat on that part of it *457 over which the *chancellor has a distinct cognizance, and which cannot come in question in the courts of law.

A commission of bankruptcy is a proceeding at law in the first instance, (o) and is matter of right, (p) and as much *ex debito justitiæ* as a writ; (q) for though the words of the act of parliament are, that the chancellor *may* grant a commission, yet that is, in effect, *must*; (r) but it seems discretionary in the chancellor whether he will seal the commission at a *private seal*. (s)

Any person therefore striking a docket, and giving the bond to the lord chancellor, as required by the act of parliament, has a right to take out a commission of bankruptcy, and to have the adjudication; if the trading, the act of bankruptcy, and the petitioning creditor's debt are proved; and there is no preventive remedy; a *caveat* against the issuing of a commission is not allowed; (t) if the commission should have been taken out without foundation, compensation must be sought by an action on the case or upon the bond; if a case for assigning the bond, or supporting an action, can be established. (u)

If, however, there be no sufficient act of bankruptcy proved, and yet there is an adjudication of the party as a bankrupt, the chancellor will, on application, *suspend the advertisement in the* *458 *gazette*, and supersede the commission; or, if expedient, *refer it back to the commissioners to consider, upon the evidence be-

(m) Ex parte Freeman, 1 Ves. and Bea. 34. 38. 42.

(n) Ex parte Sandon, 1 Rose, 84.

(o) Ex parte Gulston, 1 Atk. 138.

(p) See ex parte Browne, 18 Ves. 63.

(q) Ex parte Wilson, 1 Atk. 218.

(r) Backwell's Case, 1 Vern. 152. S. C. 2 Ch. Cas. 191.

(s) See Ib. 153.

(t) Ex parte Parsons, 1 Atk. 72.

(u) Ex parte Lanchester, 17 Ves. 512.

fore them, whether they would declare him a bankrupt, or direct an issue.(v) A bankrupt is permitted to petition against the commission in *forma pauperis*.(w)

If it be doubtful whether a party be a trader within the meaning of the statutes, the chancellor will, on application, order the commissioners not to issue any warrant of seizure against the petitioner's effects, or summon him to surrender until an *issue* has been tried whether he was a *trader*;(x) or the court, in such case, will direct an *action* to be brought by the bankrupt, and will stay proceedings in the mean time.(y) If he fails in the action, as the costs cannot be given against the bankrupt, the persons sustaining the commission are allowed to take them out of the estate.(z)

But if the adjudication be supported by clear evidence, the chancellor will not interpose, whatever might be the nature of the case.(a)

If a commission is granted, and the bankrupt dies, the commission may yet proceed;(b) provided he has been declared a bankrupt.(c)

Formerly, on the death of the king, a commission abated, but it might be renewed, though the *bankrupt was dead,(d) and the *459 commissioners proceeded from where they left off;(e) but by the 5 Geo. II. c. 39, s. 44. it is provided, that commissions shall not abate by the death of the king.

If it appears that a commission has been *fraudulently* taken out, and the solicitor a party to the fraud, costs will be given as between attorney and client, and the attorney will be committed.(f)

A commission of bankruptcy that has been opened and acted upon, cannot be *altered* even to correct a *clerical mistake*;(g)

- (v) See *Gulston v. Dale*, 1 Atk. 195.; (h) 3 Ch. Cas. 193.
and see *Ex parte Parsons*, 1 Atk. 204. (e) *Ex parte Beale*, 2 Ves. and Bea.
(w) *Ex parte Northam*, 2 Ves. and 29.
Bea. 124. (d) *Bromley v. Goodere*, 1 Atk. 77.
(x) *Ex parte Parsons*, 1 Atk. 72. (e) 2 Chan. Cas. 193.
(y) *Ex parte Bryant*, 1 Ves. and Bea. 217, 218. (f) *Ex parte Thorpe*, 1 Ves. jun. 394.
(s) *Ib.* 213. (g) *Fisher's case*, 10 Ves. 190. *Burrow's case*, *ib.* 286.
(a) *Ex parte Foster*, 17 Ves. 414.; and see *Ex parte Fletcher*, 1 Ves. and Bea. 350.

and where the commission had been opened, and the commissioners qualified, and the proof of the act of bankruptcy failed; and afterwards the petitioning creditors procured evidence of another act of bankruptcy, but subsequent to the date of the commission, a new commission was held to be necessary. *(f)* It seems, that before the commission has been opened and acted upon, the chancellor will allow an alteration, where there has been an innocent mistake of a name: *(g)* though in one case it was observed, that where once the great seal is put to a commission, it cannot be altered more than any other deed. *(h)*

The commission is directed to *commissioners* mentioned in *460 the commission to execute the same. *Formerly, it seems, the commissioners were indiscriminately named by the chancellor, to act under the particular commission, and were not confined to persons in the profession of the law. *(i)* But now there are persons specially appointed for this purpose, divided into lists, to some one of which lists every commission is directed.

An action will lie against commissioners, if they exceed or abuse their authority. *(k)*

So, the chancellor may remove commissioners, if they act improperly; and he will order them to pay costs, if they act out of the course of their duty as commissioners. *(l)*

If the commission is to be executed in the country, there must be named as commissioners two barristers, resident at or near to the place where such commission is to be executed; nor in such case can any person be a *quorum commissioner*, unless he be a barrister. *(m)*

In one case, Lord *Eldon* seems to have had some doubt whether the act of *striking a docket alone*, would bring the party within the penal clause of the act 5 *Geo. II. c. 30. s. 24.* *(n)* but he afterwards decided it would not. *(o)*

(f) Ex parte Twaites, 13 Ves. 325.

(g) See Burrow's case, 10 Ves. 236.

(h) Ex parte Thomson, 9 Ves. 208. S. C. M. S.

(i) See what is said by the lord keeper in Backwell's case, 1 Vern. 154. 2 Ch. Cas. 143. 190.

(k) 4 Inst. 277. Miller v. Scare, 2 Bl. 1144.

(l) Ex parte Scarth, 15 Ves. 293.

(m) Chan. Order, 12th Aug. 1800, prefixed to 5 vol. Ves. Reports.

(n) Ex parte Paxton, 15 Ves. p. 462. See also, 14 Ves. 85.

(o) Ex parte Browne, 15 Ves. p. 472.

In a case where a commission of bankruptcy was relinquished by the petitioning creditor, upon obtaining a security, the chancellor superseded *that commission, and ordered his debt, *461 proved under another commission, to be expunged.(p)

The knowledge of one or two individual creditors, if no general communication, does not prevent the effect of the statute 5 Geo. II, c. 30. s. 24.(q)

If a commission is maliciously sued out, the party may either petition the chancellor to assign the bond, (a matter in his discretion.) or bring an action.(r)

Until assignees are chosen the petitioning creditor, in pursuance of the statute,(s) pays the costs of prosecuting the commission, including the costs of the assignment, and of the day when assignees are chosen,(t) and the assignees, when chosen, are bound to reimburse him out of the first moneys which come to their hands. The statute directs the commissioners to settle the amount of the costs so payable; but this does not prevent the chancellor, upon petition, referring it to a master in chancery to tax them, if there should appear to be reasonable objections against the allowance made by the commissioners.(u)

Joint and Separate Commissions.

If a *joint commission* issues against several partners, a subsequent *separate commission* is invalid. So, if a *separate commission* be first issued, a *subsequent *joint commission* will be a nullity, one of the parties being already a bankrupt under a prior commission.(v) Unless therefore it was the effect of amicable arrangement, to which the debtors both joint and separate lent themselves. Lord *Eldon* thought it very difficult to conceive how any person could effectually proceed at law, under the second commission, either for civil or criminal purposes. A commission of bankruptcy, he observed, is the right of the subject; nor has the person taking out the first commission ever been

(p) *Ex parte Paxton*, 15 Ves. p. 461.

(q) *Ib.*

(r) *Brown v. Chapman*, 3 Burr. 1418.

(s) 5 Geo. II. c. 30. s. 25.

(t) *Christian's Bank. Law*, 1 vol. p. 247.

(u) *Ib.*; and see *Ex parte Vincent*, 24 Mar. 1786. *Ex parte Clarke and Coogan*, 29 May, 1789, cited 1 *Cooke's Bank. Law*, p. 12. edit. 6.

(v) *Ex parte Browne*, 18 Ves. 64.

Ex parte Cook, 2 P. Wms. 500. *Ex parte Crew*, 16 Ves. 236.

made to pay the costs of superseding it, nor have his costs been refused to him, unless it was taken out against good faith; that is, by counteracting an endeavour to produce an arrangement without a double expense. (w) If, therefore, a separate commission be superseded, it will only be on the terms of giving the party taking out the separate commission all the rights of a joint and separate creditor, accompanied with an order that he shall prove as a joint creditor, if he thinks proper. (x)

Nothing is said in any of the acts relating to bankrupts as to the *separate creditors* of a partner, (y) but this silence of the acts is amply supplied by decision. Under a joint commission of bankrupt, the affairs of the separate creditors may be arranged; and also of separate firms of two or more of the partners. (z)

- *463 *Joint creditors will, upon petition, be allowed to prove under a separate commission, for the purpose of assenting to or dissenting from the certificate, (a) and of sharing the surplus, if any, of the separate estate, after the separate debts are satisfied; (b) but none of the joint creditors are allowed to vote in the choice of assignees, (c) or to receive dividends out of the separate estate; (d) with the exception (a singular one) of a joint creditor who happens to be the petitioning creditor under such a commission; (f) for he has lost his remedy at law; and this, though, as to part of the debt he proves, he is a trustee for another joint creditor. (g) The exclusion of the joint creditors seems founded on the principle, that where a person has two funds to which he may resort, the court will not allow him to attach himself upon one fund, to the prejudice of those who have no other, and to neglect the other fund; (h) and therefore the joint creditors are not excluded from proof, where there are no joint effects, and no solvent partner; (i) or no separate debts; (k)

(w) Ib. 64, 65.

(x) Ib. 66.

(y) See Taylor v. Field, 4 Ves. 397.

(z) Ex parte Bonbonus, 8 Ves. 545.
Ex parte Rawson, 10 Ves. 163.

(a) 1 Atk. 96. 138.

(b) Horsey's case, 3 P. Wms. 25.

(c) Ex parte Alcock, 11 Ves. 603.

(d) Ex parte Bevan, 9 Ves. 227.; but

this was not so formerly; see Crisp and Peritt, Willes's Rep. p. 467.

(f) See Ex parte Detastet, 17 Ves.

250. Ex parte Akerman, 14 Ves. 604.
and the cases there referred to.

(g) Ex parte Detastet, 17 Ves. 247.

(h) See Ex parte Elton, 3 Ves. 240.

(i) Kensington Ex parte, 14 Ves. 447.

Ex parte Hayden, 1 Bro. C. C. 454.

(k) See 1 Atk. 227.

or where it is ascertained what is the amount of the separate debts, and the joint creditors agree to pay the *separate creditors twenty shillings in the pound. (l) *464

Where, however, there is a bankruptcy among partners, concerned also in other trades, the paper of one firm being given to the creditors of another, dividends are allowed out of both estates. (m)

Under a separate commission of bankruptcy against one partner, the other partners remaining solvent, an account is directed of the joint estate, even in the absence of the other partners; and upon the application of any one joint creditor, whether the others choose it or not, the whole account being taken in the bankruptcy, (n) the joint creditors will be paid *pari passu* out of the joint estate, and the residue distributed only according to the respective interests of the partners. (o) "This," says Lord Eldon, "is done every day; though how it originally became law I do not know." (p)

A commission may issue against one partner of three for a joint debt, though an action cannot be maintained against one partner only. (q)

A joint and separate commission were before the time of Lord Hardwicke (r) permitted to stand together, at the hazard of all the inconvenience that might arise with reference to legal questions; *but now, if the joint commission can be sustained, it *465 stands; and the assignees can, at law, recover both the joint and separate estate, and, by order, under that commission, the same distribution is made as if both commissions stood. (s)

The joint creditors are first paid out of the partnership or joint estate, and the separate creditors out of the separate estate of each partner; and if there be a surplus of the joint estate, beyond what will pay the joint creditors, the same is applied to

(l) *Ex parte Tailt*, 16 Ves. 197. and *Ex parte Chandler*, 14 Ves. 35.; and see *Ex parte Abell*, 4 Ves. 837.; and see *Ex parte Hubbard*, 13 Ves. 424.

(m) *Ex parte Bonbonus*, 8 Ves. 546.

(n) See *Ex parte Voguel* and others, 1 Atk. 131.

(o) *Dutton v. Morrison*, 17 Ves. 209.;

and see *Taylor v. Field*, 4 Ves., and *Everett v. Backhouse*, 10 Ves. 98.

(p) *Barker v. Goodair*, 11 Ves. 86.

(q) *Ex parte Crisp*, 1 Atk. 133.

(r) See in the matter of *Simpson*, 1 Atk. 138. Sed qu.; and see *Ex parte Cook*, 2 P. Wms. 500.

(s) *Ex parte Martin*, 15 Ves. 116. *Ex parte Rawson*, 18 Ves. 163.

pay the separate creditors ; and if there be, on the other hand, a surplus of the separate estate beyond what will satisfy the separate creditors, it goes to supply any deficiency that may remain as to the joint creditors.(t)

Formerly, without a specific order, a *separate* creditor could not prove under a joint commission ;(u) but now, there is a *general order* for that purpose.(v)

A creditor, by a *joint and several* obligation, may prove either upon the joint or the separate estate, but not upon both ;(w) the reason of which is not very intelligible :(x) and it is settled he must *elect*, and when he has once elected to go under the joint
 *466 estate, his fate is the same as that of all *the other joint creditors, and he has no preference to them in case of a surplus of the separate estate beyond the separate debts.(y)

Where a separate creditor proved on the joint estate, (after he had had time to look into the accounts of both estates,)(z) he was allowed, on petition, to waive his proof, and prove under the separate estate but not to disturb a dividend previously made.(a)

Separate creditors, who have taken a *joint* security, may prove against the separate estate, on giving up the joint security.(b)

Where there is a partnership, and *separate* debts, the partnership is not admitted a creditor upon any individual, nor any individual upon the partnership, until the creditors of the individual, and the creditors of the partnership are satisfied to the extent of twenty shillings in the pound out of the respective estates. It is also settled,(c) that where the separate creditors are paid twenty shillings in the pound, and there is a surplus, that surplus shall not go immediately to pay interest to the separate creditors, but is applicable to make the joint creditors equal with them as to the principal.(d)

The creditors of a partnership which has failed, have a right

(t) *Ex parte Cook*, 2 P. Wms. 500.
Horsley's Case, 3 P. Wms. 25.

(u) *Ex parte Sandon*, 1 Atk. 68. 99.
Ex parte Bandier, Ib. 97.

(v) *General Order*, 8th March, 1794.

(w) *Ex parte Bond and Hill*, 1 Atk.
 98. *Ex parte Banks*, Ib. 106.

(x) See *Ex parte Bevan*, 10 Ves. 108.

(y) *Ib.* 109, 110.

(z) *Ex parte Bond and Hill*, 1 Atk.

(a) *Ex parte Beilby*.

(b) *Ex parte Lobb*, 7 Ves. 592.

(c) *Ex parte Clarke*, 4 Ves. 677.

(d) *Ex parte Reeve*, 9 Ves. 590.

to come upon the *separate* estate of one partner, in respect of effects taken out of *the partnership by him without the privity *467 of the other partner.(e)

If it be proved that there is another partner, known to the world, a joint commission, not including him, would be bad ;(f) but if there be a dormant partner, who is not an ostensible contracting party, the creditor, though he may if he chooses, is not bound to go against him.(g)

Where one partner is an *infant*, or a *lunatic*, a joint commission cannot be sued out against the others ; but separate commissions must be taken out.(h)

If there be a dormant partner by a share of the profits, but the property by agreement belongs exclusively to the other, a joint commission cannot be supported.(i)

Separate creditors cannot come upon the joint estate for a sum brought into the partnership beyond his share ; for creditors rely upon the ostensible state of the fund.(k)

A separate commission of bankruptcy has been established, though the other partner died before the assignment.(l)

Superseding Commission.

None of the bankrupt statutes give any direction *as to su- *468 *perseding* commissions, except in the instance of a petitioning creditor, privately receiving part of his debt, in which case it is expressly declared, that the commission shall, and may be superseded ; giving the *right* to the party, and *leaving no discretion* in the chancellor. As to all other cases, the court is in the habit of considering a commission of bankruptcy as, what it is frequently called, a *species of execution* ; (for it is not an execution in the strict sense ;) (a) and over that species of execution, the court conceives itself to have the same discretionary power as other courts have, to prevent an unlawful use of the law.(b)

But the court will not supersede a commission without di-

(e) Ex parte Assignees of Lodge and Fendall, Bankt. 1 Ves. 166.

(f) Ex parte Benfield, 5 Ves. 426. Allen v. Downes, Willes, 474. in note.

(g) Ex parte Hamper, 17 Ves. 412.

(h) Ex parte Layton, 6 Ves. 440.

(i) Ex parte Hamper, 17 Ves. 403.

(k) Ex parte Assignees of Lodge and Fendall, 1 Ves. 166.

(l) Ex parte Smith, 5 Ves. 295.

(a) See Ex parte Brown, 1 Ves. and Bea. 66.

(b) Ex parte Freeman, 1 Ves. and Bea. 40, 41.

recting an issue, unless it appears very plainly to be taken out *fraudulently or vexatiously*.(c)

If an offer be made to secure the payment of all the debts proved under the commission, by property immediately available to the creditors, or if it appears that a part of the bankrupt's estate will pay all his creditors, the commission will be superseded.(d)

Generally, it is true that a commission of bankruptcy cannot be supported by a trading during *infancy*;(e) but where a bankrupt who had held *himself forth to the world as an adult and *ex jure*, and traded in that character, and contracted debts to a considerable amount for two years previous to his commission, it was held, he was not entitled to have his commission superseded, the supersedeas being opposed by the creditors, and was left to his remedy at law.(f)

A joint commission of bankruptcy has been superseded on the ground of the *infancy* of one partner, on the petition of the assignees under a separate commission.(g)

A *lunatic*, it seems, may be made a bankrupt,(h) provided the act of bankruptcy was committed when he was sane.(i)

It has been questioned whether the *bankrupt* can supersede a commission against him on the ground of a previous act of bankruptcy and a sufficient debt.(k)

A bankrupt cannot supersede his commission by impeaching the petitioning creditor's debt, on the ground of a security taken privately, provided against by the statute.(l)

A commission may be superseded with the consent of the *petitioning creditor*;(m) but where a creditor, upon receiving his *470 debt, superseded the *commission without an application to the court, he was ordered to refund.(n)

(c) Ex parte Wilson, 1 Atk. 218.

(d) Ex parte Bryant, 1 Ves. and Bea. p. 216 & 220.

(e) Ex parte Moule, 14 Ves. 603.
Ex parte Sydebotham, 1 Atk. 148.

(f) Ex parte Watson, 16 Ves. 266.

(g) Ex parte Henderson, 4 Ves. 163.
Ex parte Barwis, 6 Ves. 601.

(h) Anon. 13 Ves. 590.; but see Ex parte Layton, 6 Ves. 438.

(i) Ex parte Priddey, mentioned, 1 Cooke's Bankrupt Law, p. 42.

(k) Ex parte Bullock, 14 Ves. 452.

(l) 5 Geo. II. c. 30. s. 24. Ex parte Kirk, 16 Ves. 464.

(m) Ex parte Trigwell, 1 Ves. and Bea. 348. Backwell's Case, 1 Vern. 208.

(n) Ex parte Thomson, 1 Ves. jan. 157.

Where a person, after suing out a commission, kept it by him for six months, without proceeding on it, it was ordered to be superseded.(o)

An order for a *supersedens* has no effect till the writ issues ;(p) and the writ is not considered as sealed for the purpose of proceeding on it while in the chancellor's hands, but only from the time when delivered to the messenger.(q) By a regulation, approved by the legislature, the writ, on paying a larger fee, may be *privately sealed*, and the party may choose for himself whether he will have it more or less speedily.(r)

Where a commission was superseded *for fraud*, and nothing done under it, and the petitioning creditor was not to be found, the assignees, though not privy to the fraud, nor possessing any of the effects, were ordered to reimburse the messenger the expense subsequent to the choice of assignees, but not the expense previously incurred.(s)

Formerly, the chancellor, on the application of third persons, creditors, was often obliged to supersede commissions on the ground of a prior, *secret act of bankruptcy, if there were debts *471 existing at the time of the former act, upon which a commission might be sued out upon such prior act.(t) This often proved extremely hard on assignees, purchasers, and others. By a late act,(u) this inconvenience is remedied, and it is provided, that no commission of bankruptcy shall be avoided by an act of bankruptcy committed prior to the contracting of the petitioning creditor's debt, if *he had not notice of such act of bankruptcy when the debt to him was contracted*: the issuing of a former commission, though afterwards superseded, to be deemed notice, if it shall appear that an act of bankruptcy had been actually committed.(v)

A commission of bankruptcy is never superseded where there

(o) Ex parte Puleston, 2 P. Wms. 546.; approved in Ex parte Freeman, 18 Ves. 41.

(p) Ex parte Leicester, 6 Ves. 429. Ex parte Layton, Ib. 439.

(q) Ex parte Freeman, 1 Ves. and Bea. 38, 39.

(r) Ex parte Leicester, 6 Ves. 432.

(s) Ex parte Hartop, 9 Ves. 109.

(t) See 2 Esp. N. P. 595, 597. in note, and what is said in Bullock's Case, 1 Taunt. 88.

(u) 46 Geo. III. c. 135. s. 5.

(v) Lord Eldon was of opinion, that this latter clause would have been better omitted. Ex parte Bullock, 14 Ves. 466. It did not form part of the act, as originally proposed.

have been *purchasers* under it, (w) unless the purchases are confirmed; (x) and even where there is no real estate, the court will not, it seems, except from necessity, supersede a commission, especially if the commission has proceeded in the usual way, and all the creditors have acquiesced in it, and the whole is completely finished; (y) because, by doing so, every thing
 *472 done *under it is void, and assignees are left responsible. (z)

A commission of bankruptcy has been ordered to be superseded to defeat a prosecution for omitting to surrender under circumstances of erroneous advice; there being no fraud in the case; and another commission issued and proceeding. (a)

We have already observed on the remedy where a commission is maliciously sued out. (b)

It is very common to pray, not only that a commission may be superseded, but, also, that the bond may be assigned: and the bond will be assigned, where the commission is fraudulently and maliciously taken out; (c) but as the court of king's bench has determined, that where the bond is assigned, the whole sum of 200*l.* must be recovered, (d) (Lord *Hardwicke* seems to have been of a different opinion,) (e) the chancellor will not assign the bond where there is nothing wilful in the creditor's conduct, but sometimes supersedes the commission without prejudice to an action, (f) and sometimes directs the bond to stand as a security for costs: and in a case where the petitioning creditor had
 *473 himself become a bankrupt, he directed the bond *to be considered as a security for a stated sum (30*l.*) for costs. (g) Lord *Hardwicke* held, that it was in the breast of the court, where the bankruptcy was in a doubtful case, and the commission superseded, either to direct an inquiry before a master, of the damages sustained by the bankrupt, or a *quantum damnificatus* upon an issue at law; and after the damages were settled, the

(w) *Ex parte Edwards*, 10 Ves. 104.

(x) *See Ex parte Rawson*, 18 Ves.

164.

(y) *Ex parte Desanctis*, 1 Atk.

146.

(z) *Ex parte Jackson*, 8 Ves. 533.

(a) *Ex parte Lavender*, 18 Ves. 18;

and see *Ex parte Wood*, 1 Atk. 19.

(b) *Ante*, p. 461.

(c) *See Ex parte Mackerness*, 1 P.

Wms. 260.

(d) *Smith v. Broomhead*, 7 Term

Rep. 300. *Smith v. Edmonson*, 3

East, 22. *Ex parte Gaytor*, 1 Atk.

144.

(e) 1 Atk. 201.

(f) *Ex parte Rimes*, 14 Ves. 600.

(g) *Ex parte Lane*, 11 Ves. 416.

court might, for the better recovery thereof, order the bond to be assigned.(k)

A commission, it seems, may be superseded even after a certificate has been obtained, but not where the application is a considerable time after the certificate, and an application might have been made before.(i)

A bankrupt cannot supersede his commission before he has surrendered;(k) nor can he supersede his commission if he is under a commitment for not answering to the satisfaction of the commissioners.(l)

A former commission may be superseded by a creditor wishing himself to take out a commission, on the ground that it was founded on a concerted act of bankruptcy, to which he was no party; and it will be superseded, with costs.(m)

Where a commission is superseded merely because *there *474 was a defect as to the petitioning creditor, but no manner of doubt as to the act of bankruptcy, only the costs of the supersedeas were allowed.(n)

If a commission is taken out, by concert with the bankrupt, "upon all principle, and the habitual course in bankruptcy, it cannot stand;"(o) but it is no objection to a commission, that it was taken out by a creditor, to prevent the execution of another creditor.(p)

The practice is to supersede a commission, upon the consent of all the creditors who have proved where the application is made, though that may be a surprise upon creditors who might intend to prove their debts at the second or third meeting;(q) but where a creditor declares he shall be able to prove in a few days, the court will not supersede the commission till such creditor has an opportunity of proving his debt.(r)

A commission has been superseded where all the creditors,

(h) Ex parte Gaytor, 1 Atk. 144.; and see Ex parte Hall, 1 Atk. 201.

(i) Ex parte Moule, 14 Ves. 602.

(k) Ex parte Stokes, 7 Ves. 405. Ex parte Jones, 8 Ves. 323. Ex parte Jones, 11 Ves. 409.; and see Ex parte Bean, 17 Ves. 43.

(l) Ex parte Bean, 17 Ves. 47.

(m) Ex parte Bowen, 16 Ves. 145.

(n) Ex parte Godwin, 1 Atk. 100.

(o) Ex parte Steel, 16 Ves. 165.; and see Ex parte Bowes, 11 Ves. 541.

(p) Ex parte Bowes, 11 Ves. 541. Ex parte Arrowsmith, 14 Ves. 209. Ex parte Gardner, 18 Ves. 43.

(q) Ex parte Duckworth, 16 Ves. 416.

(r) Ex parte Crisp, 1 Atk. 135.

except two, who could not be found, were paid their debts, the securities of those two creditors being delivered up with receipts upon them, and their signatures proved.(s)

Where it is referred to the master to settle what is due to the creditors under the commission, and, on payment by the bankrupt, the commission *to be superseded, the creditors are entitled to interest from the time of the master's report.(t)

Second Commission.

It is in the discretion of the great seal, whether a second commission, issued against a person who has not obtained his certificate under the first commission, shall be superseded or not.(u)

In general, so long as the first commission subsists, of whatever date, the second is bad, unless the bankrupt has obtained his certificate.(v) But where a bankrupt (the commission subsisting) has gone again into trade, and a new commission has issued, which the bankrupt has attempted to supersede, it has been held, that, if persons claiming beneficially under the old commission did not mean to interfere with the effects under the latter commission, the court would not interpose, though the difficulty would occur, that the first commission might be set up as a bar to an action under the second.(w)

In some cases where a commission of bankruptcy has issued against a *distant country bank*, and has been executed in London, an *auxiliary commission* has been issued, directed to commissioners in the country, for the mere purpose of *receiving the proof of debts(x) under 20l. ;(y) and the proofs so taken, have been ordered to be received under the commission in London ; but liberty to examine the bankrupt under such commission has been refused.(z)

A second commission of bankruptcy against an uncertificated bankrupt is, in law, totally void to all intents ; but upon a petition to the chancellor to supersede such a commission, it is usual for the chancellor to direct the petition to stand over,

(s) Ex parte King, 2 Ves. jun. 40.

(t) Ex parte Rooke, 1 Atk. 244.

(u) Lees Ex parte, Poulden, 16 Ves. 477.

(v) Ex parte Proudfoot, 1 Atk. 252.
Ex parte Browne, 4 Bro. C. C. 210.

(w) Ex parte Martin, 15 Ves. 114. ;
and see Ex parte Rhodes, 15 Ves. 543.

(x) Ex parte Upham, 17 Ves. 212. ;
and the case in note, p. 213.

(y) Ex parte Scott, Rose, 12.

(z) Ib.

with notice to the creditors under the prior commission, and an arrangement is afterwards made.(a)

Where there is a joint commission against two partners, each of them must be found bankrupt; and though one of them should die, the commission may still go on; but if one of the joint traders be dead at the time of taking out the commission, it abates, and is absolutely void.(b)

No second commission can now be sent to the *lord chancellor* for his signature, without a note of what hath passed in the first.(c)

When a commission is procured, the next step is to obtain an adjudication of the bankruptcy by the commissioners, and for this purpose, the *petitioning creditor's debt* must be proved before the commissioners; and, also, the *trading* and the *act of bankruptcy*. If the commissioners *adjudge the party not to be *477 a bankrupt, and the petitioning creditor is dissatisfied with such adjudication, he may petition the chancellor; and a person adjudicated a bankrupt may, before the insertion of the advertisement in the *gazette*, petition to stay the advertisement, and for a supersedeas of the commission, if there be ground for it.(d)

The *commissioners* cannot, it seems, compel the attendance of persons before the bankruptcy is declared.(e) The expired statutes, 4 and 5 Anne, c. 17. and 5 Geo. I. c. 24. expressly enabled the commissioners to send for any person and examine them respecting any act of bankruptcy, and upon refusal might commit them.

The chancellor, however, may direct witnesses to attend the commissioners to prove the act of bankruptcy,(f) or other requisites to support the commission;(g) and where they do not

(a) *Ex parte Crew*, 16 Ves. 236.

(b) *Beaseley v. Beaseley*, 1 Atk. 97.

(c) *Ex parte Freeman*, 1 Ves. and Bea. 38. 42.

(d) As was done in *Ex parte Foster*, 17 Ves. 414. S. C. 1 Rose, 42.

(e) *Ex parte Jones*, 1 Rose, 39.; but see the forcible observations of Mr.

Christian, *Christian's Bankrupt Law*, 1 vol. p. 178, 9.

(f) *Ex parte Higgins*, 11 Ves. 8. *Ex parte Lund*, 6 Ves. 781.; and see *Ex parte Farr*, 9 Ves. 515. and particularly *Ex parte Jones*, 17 Ves. 379.

(g) *Anon.* 14 Vcs. 450.

attend, they will be made to pay the costs of not attending.(e) and committed for their contempt.(f)

But though the chancellor will in these cases order persons to attend to prove a specific fact; for instance, the witnessing the execution of a deed; yet where a creditor speculates loosely *478 upon *the possible proof that might be made some way or other, by some person or other, who might be found, the court, it seems, will not compel the attendance of witnesses.(g)

A bankrupt's wife cannot be examined against her husband to prove his bankruptcy;(h) but the bankrupt himself may, by the statute, (5 Geo. I.) be examined touching his bankruptcy.(i)

A witness, it seems, cannot claim it as a right to be attended by counsel;(k) nor will the chancellor on petition restrain the commissioners in their examination.(l)

A witness summoned to attend by the commissioners cannot be arrested, nor can detainers be effectually lodged against him; but, on motion, the creditors will be ordered to discharge the bankrupt.(m)

So, a witness who, *voluntarily and without a summons*, is actually before the judicature, tendering his evidence, is entitled to the same protection;(n) but a question might arise upon the effect of a want of summons, where the arrest happens *cundo*.(o)

Petitioning Creditor's Debt.

A strict inquiry into the petitioning creditor's debt is advisable, as it forms the foundation of the commission.(p)

*479 *By an order of Lord Rosslyn,(q) the petitioning creditor must be present at the meeting for the purpose of declaring the party a bankrupt, it being extremely useful in the commencement of the proceedings to record evidence which will, in all stages, be sufficient to support the commission.(r) If, however,

(e) Ex parte Gardener, 1 Ves. and Bea. 78.

(f) Ex parte Lund, 6 Ves. 781. Ex parte Higgins, 11 Ves. 8.

(g) Ex parte Freeman, 1 Ves. and Bea. 41.

(h) Ex parte James, 1 P. Wms. 610.

(i) Ib. 611.

(k) Ex parte Parsons, 1 Atk. 204.

(l) Ex parte Bland, 1 Atk. 205.

(m) Ex parte King, 7 Ves. 312.; see Ex parte Kerry, 1 Atk. 54.

(n) Ex parte Byres, 1 Ves. and Bea. 316.

(o) Ib. 312.

(p) Ex parte Bowes, 4 Ves. 177.

(q) General Order, 26th November, 1798.

(r) Ex parte Foster, 17 Ves. 415.

the petitioning creditor is ill, and incapable of appearing, except at the hazard of his life, the chancellor will, on an affidavit of the circumstances by some medical gentleman, order the commissioners to admit proof of the petitioner's debt by production of the office copy of the affidavit, upon which the commission was grounded.(s)

If there is not a *debt in law*, but only a debt in *equity*, though ever so strong, a commission cannot be supported.(t) An assignee of a bond, therefore, cannot petition for a commission,(v) he not being a legal creditor;(w) nor is a debt barred by the statute of limitations sufficient to support a commission.(x)

It was formerly necessary that there should have been a good petitioning creditor's debt subsisting anterior to the act of bankruptcy; but *now, by a recent statute,(y) no commission is *480 avoidable by any act of bankruptcy prior to the debt of the petitioning creditor, of which he had no notice at the time of suing out the commission.

If a creditor has his debtor in *execution*, he cannot petition for a commission of bankruptcy.(z) By the expired statute, 41 Geo. III. c. 64.(a) he was enabled to obtain a commission, and the debtor became discharged of the execution.

A petitioning creditor cannot proceed at law, but is deemed to have made his election.(b)

Though a verdict for damages be obtained, in an action for a breach of promise of marriage, yet this alone, it seems, without a judgment, before the date of the commission, will not form a sufficient petitioning creditor's debt.(c)

An attorney, though he cannot bring an *action* without deli-

(t) Ex parte Edwards, 8 Ves. 318.

(y) 46 Geo. III. c. 135. s. 5.

(f) See Ex parte Hillyard, 2 Ves. 407. Ex parte Williams, lb. p. 252.

(s) Cohen v. Cunningham, 8 T. R. 123.; but see the forcible observations of Mr. Christian in his Bankrupt Law, 1 vol. p. 218.

(v) Medicot's case, 2 Str. 899.

(w) Ex parte Lee, 1 P. Wms. 782.

(a) It is mistakenly considered as an existing statute in 1 Cooke's Bankrupt Law, p. 28. edit. 6.

(z) Anon. Moseley, 37. Ex parte Dowdney, and Ex parte Seaman, 15 Ves. 498. This point may now, perhaps, be considered as settled; but see Mr. Christian's able remarks, Christian's Bankrupt Law, 1 vol. 321, &c. Lord Eldon, however, as I have been informed, on reading these remarks, continued of the opinion he had expressed.

(b) Cooke's Bankrupt Law, 1 vol. p. 25. and cases there cited, 6th edit.

(c) Ex parte Charles, 16 Ves. 256.; and see S. C. 14 East, 197.

vering his bill, (see 2 G. II. c. 28. s. 22.) may take out a commission of bankruptcy; but the bill must be afterwards examined.(b)

The petitioning creditor must not be an *infant*, for in such case he cannot enter into the bond; nor will another person be permitted to enter into the bond for him, but the commission must be superseded.(c)

- *481 *The petitioning creditor must prove his debt, not merely on the opening of the commission, but also a second time, at some meeting for the proof of debts, to entitle himself to the rights of a creditor under the commission.(d)

With these observations we shall close what is to be remarked upon the petitioning creditor's debt; for what is, or is not, a sufficient debt to support a commission, is a question of law, the consideration of which is not within the plan of this work.

Act of Bankruptcy.

What is, or is not, an act of bankruptcy, is, also, a mere matter of law,(e) the consideration of which is not within the scope of this work. In an action of trespass against the messenger of the commission, the act of bankruptcy may be tried.(f) The question may also come before the chancellor on a petition to supersede the commission;(g) but if the court has doubts, it directs an issue to be tried at law.(h) On a doubtful point of law, which arose in bankruptcy, Lord *Hardwick* observed, "it is not proper for me to decide this question absolutely, *because it is a mere matter of law*;"(i) we shall, therefore, make only a few observations on this head.

- *482 *If commissioners find a man a bankrupt who is not so, an action, it has been held, will lie against them.(k)

Nothing is an act of bankruptcy, though the consequences may be precisely the same, except what is described in the statutes.(l)

(b) Ex parte Steele, 16 Ves. 166.
Ex parte Sutton, 11 Ves. 163.

(c) Ex parte Barrow, 3 Ves. 554.

(d) See 2 Christian's Bankrupt Law, 423.

(e) 1 Atk. 199.

(f) See Parker v. Wells, 1 Bro. C. C. 178. in note.

(g) Ex parte Harrison, 1 Bro. C. C. 173.

(h) See 1 Atk. 102.

(i) Ex parte Meymot, 1 Atk. 197.

(k) Whitlocke's case, Sel. Cas. in Ch. 46.; and see ante, p. 460.

(l) Dutton v. Morrison, 17 Ves. 198.

If an act of bankruptcy be committed, and afterwards, *on the same day*, a commission issues, such commission is legal and valid, and cannot, for that reason, be superseded ;(m) and a commission may be supported, if *sealed*, after the act of bankruptcy, though the docket was struck before the act of bankruptcy was committed.(n) But if the petitioning creditor did not *believe* an act of bankruptcy was committed, he would be guilty of perjury.(o)

Though a party concerting an act of bankruptcy cannot maintain a commission upon it,(p) yet, another creditor, who was not privy to that transaction, may; and the bankrupt, or any other person concerned in it, cannot make the objection.(q)

And, though an act of bankruptcy be concerted, yet, if the party can support the commission by another act of bankruptcy, he may ;(r) even though the latter act of bankruptcy occurred *subsequent to striking the docket ;(s) and the privy of the *483 bankrupt is no objection,(t) though formerly it was.

A commission may be sustained by an act of bankruptcy committed after retiring from trade, the debts contracted in the course of that trade remaining unpaid.(u)

Provisional Assignment.

The crown is not bound by the statutes in bankruptcy ;(v) and, therefore, an *extent*, in respect of a debt that is due,(w) served upon the property of the bankrupt, will bind from the teste of the writ, unless there has been an assignment by the commissioners ;(x) this, among other things, gave rise to what are termed *provisional assignments*.

It seems a hardship upon creditors, that a debtor to the crown may sue out an extent in aid, against the bankrupt, before the

(m) Wydown's case, 14 Ves. p. 87.
Ex parte Du Frene, 1 Ves. and Bea.
54.

(n) 14 Ves. 89. Ex parte Du Frene,
1 Ves. and Bea. 51.

(o) 1 Ves. and Bea. 56.

(p) Ex parte Gardener, 18 Ves. 48.

(q) Ex parte Bourne, 16 Ves. 146.

(r) Ib. 148. Ex parte Du Frene, 18
Ves. 52.

(s) Ex parte Du Frene, 18 Ves. 52.

(t) Ex parte Edmonson, 7 Ves. 303.

(u) Ex parte Bamford, 15 Ves. 458.
and see Ib. p. 493.

(v) Ex parte Russell, 1 Rose, 278.

(w) A debt *not due*, will not ground
an extent. Attorney General v. Bebb,
1 Rose, 19. and case cited in note.

(x) See 1 Cooke's Bankrupt Laws,
384., last edition; and see Ex parte
Smith, 5 Ves. 297.

assignment of his estate to an assignee, and may recover the whole of the debt, and that the assignees afterwards can have no remedy, though the debtor to the crown is sufficiently able to pay his debt without the bankrupt's property.(y)

- *484 *A provisional *bargain and sale* seems as necessary, in respect to the *real* estate of a bankrupt, as a provisional assignment is in regard to *personal* property, in order to prevent the effect of an extent.(z)

Where a bankrupt is entitled to *copyhold* property, it is not usual (in pursuance of suggestion by Lord *Hardwicke*)(a) to include it in a provisional assignment; but, in order to save a second fine, the commissioners convey to a purchaser in the first instance;(b) nor can any inconvenience result, for *copyholds* are not liable to be taken in *execution*, or upon an *extent*.(c)

There are no decided cases to show what is the authority of a provisional assignee over the bankrupt's property; but, it seems, that, whilst he continues such, he has all the authority of assignees.(d)

In one case, it seems, a debt to the crown was preferred to creditors under a bankruptcy, the sheriff being in possession, under several extents; the teste of one of which, for part of the debt, was on the day the provisional assignment was made, and the others issued *subsequently*.(e)

- *485 If a messenger, under a commission of bankruptcy, is put out of the possession of property, *it is a contempt, and the parties will be ordered to give security for answering the bankrupt's interest;(h) and if a bond of indemnity be given to secure persons from the consequences of doing an act amounting to a contempt, the person giving such bond is, himself, guilty of a contempt.(i)

(y) See *Phillips v. Shaw*, 8 Ves. 244., and cit. in 2 *Christian's Bank Law*, 181.

(z) See 2 *Christian's Bankrupt Law*, 180., where the learned author observes, a provisional bargain and sale has never yet been mentioned in any treatise upon the Bankrupt Law.

(a) *Drury v. Man*, 1 Atk. 98.; and see post, p. 489. in note.

(b) *Charman v. Charman*, 14 Ves. 583., in note 2.

(c) 1 Atk. 96.

(d) See 2 Vol. *Christ. Bank. Law*, 180.

(e) *Rogers v. Mackenzie*, 4 Ves. 752.; and see *Parker's Rep.* 126.

(h) Ex parte *Dixon*, 8 Ves. 104.

(i) Ib. Ex parte *King*, 7 Ves. 316.

Effect of the Commission upon the Property of the Bankrupt.

The question; what property passes under a commission of bankruptcy, is, in general, a question of law; we shall therefore only make a few observations on the subject.

By the statute of the 13th Eliz. c. 7. s. 2. the conveyance, by the commissioners, of the bankrupt's property to the assignees, passed all the real and personal estate of the bankrupt, from the time of the act of bankruptcy; but by the statute 1 Jac. I. c. 15. s. 14. it was provided, that no debtor *bona fide* paying money to the bankrupt, without notice that he is a bankrupt, or according to the interpretation of this act, without notice of an act of bankruptcy, should be liable to repay the same. And by the 1 Jac. I. c. 19. s. 14. the operation of the act of bankruptcy was further limited; and it was provided, that if an act of bankruptcy was committed, and afterwards a sale by the bankrupt, and a *commission issued, and *five* years had elapsed be- *486
tween the bankruptcy, or, as it was understood, between the act of bankruptcy and the date of the commission, the intermediate sale should be effectual. The relation the assignment had, not only overcharged acts done in *pais*, but also acts on *record*, and legal acts done by him, such as judgments: so that if execution was taken out after the act committed, upon a judgment before, such execution was undone and set aside.(b)

This operated very harshly and inequitably, and, long ago, Sir *Joseph Child* complained of it;(c) and by a recent statute(d) it is enacted, that all conveyances by, and all transactions with any bankrupt, *bona fide*, more than two calendar months before the date of the commission, shall be valid, notwithstanding any prior act of bankruptcy, provided the party dealing with the bankrupt had not notice of it at the time, or that he was insolvent, or had stopped payment.

If, after the assignment of the real estate by the commissioners to the assignees, and before the bankrupt has obtained his certificate, any *real estate* devolves on the bankrupt, there must be a new bargain and sale;(e) but no new assignment is necessary of *personal property* acquired within such period.(f)

(b) See *Billon v. Hyde*, 1 Ves. 328.

S. C. 1 Atk. 127.

(c) *Child on Trade*, p. 71.

(d) 46 Geo. III. c. 135.

(e) *Ex parte Pondfoot*, 1 Atk. 253.

(f) *Kitchin v. Bartsh*, 7 East, 53.

The law is very clear that (with the exceptions before alluded
 *487 to) the commission has *relation to the act of bankruptcy, and all the bankrupt's property, real and personal, present or future, vests by relation from that time, (g) insomuch, that if a commission issue, and an execution be issued against the bankrupt's effects, though only two or three hours subsequent to the act of bankruptcy, a fraction of a day, it cannot be supported. (h)

Estates in *Scotland*, in *Ireland*, (i) or in the *plantations*, belonging to the bankrupt, pass under his commission. (k) So totally does the bankruptcy divest the bankrupt of all his interest, that, if he files a bill in respect of property, a *demurrer* will lie; (l) unless where he charges collusion by and between the assignees and the debtors, and avers that there will be a surplus, and charges a direct application to the assignees to sue. (m)

It is important, however, to observe, that the assignees take, subject to all the *equities*, (n) and equitable liens, (o) under which the bankrupt held his property.

Lands held by the bankrupt in fee, in fee tail, for life or for years, rents, annuities, reversions, and remainders, and any future or contingent interest in land; and lands, or any other interest to which he is entitled, *jure marito*, *pass under the assign-
 *488 ment, subject to the equities affecting it; or which the bankrupt has purchased jointly with his wife, children, or child, for his own use, or for such use or interest as he might part with.

Where a trader, therefore, who afterwards became a bankrupt, purchased in the joint names of him and his wife, it was held void as against the creditors. (p)

And where a trader advanced half the money for the renewal of a lease to another, and the lessee gave a note to repay the money, unless she should, by will, give the estate to one of his

(g) *Barker v. Goodair*, 11 Ves. 83.

(h) See *Spencer's case*, mentioned in note to *Franklin v. Lord Brownlow*, 14 Ves. 554. in note; and see *Ex parte D'Obree, &c.* 8 Ves. 82. and *Barker v. Goodair*, 11 Ves. 84.

(i) *Neave v. Nottingham*, H. Black. 132.

(k) *Benfield v. Solomon*, 9 Ves. 80. 86.

(l) *Ib.* 77.

(m) *Ib.*

(n) *Mitford v. Mitford*, 9 Ves. 87. *Ex parte Herbert*, 13 Ves. 189.

(o) *Brown v. Heathcote*, 1 Atk. 162.

(p) *Glaister v. Hewer*, 8 Ves. 195. 9 Ves. 12. 11 Ves. 377.

children, and she bequeathed the estate to his daughter, and the father became a bankrupt, a moiety of the estate was held to be vested in the assignee, under the statute 1 Jac. I. c. 15.(q)

The creditors are also held to be entitled to the interest the husband has in his wife's *choses in action*.(r)

If there be debt due to the wife *dum sola*, or which becomes due to her during the coverture, and which would survive to her in case her husband had died before he had reduced it into his possession, and he becomes bankrupt, and dies after an assignment under the bankrupt laws, but before the assignees have gained possession of the property, the right of survivorship, it seems, remains in the wife.(s)

*Lands held by the bankrupt in joint tenancy, pass. Copy- *489 holds also pass,(t) as likewise do contingent interests or possibilities,(u) if they are such as can be assigned or released, and disclosed upon the last examination : (v) an estate, therefore, acquired by descent, after a certificate obtained, is not assignable by the commissioners.(w)

The deed of assignment by the commissioners has, when enrolled,(x) all the operation over an estate tail in a bankrupt, as a recovery suffered by the bankrupt, before his bankruptcy, would have had, and greater, for it conveys a fee, and clear of mortgages and encumbrances, from the time of his death ; (y)

(q) *Fryer against Flood*, 1 Bro. C. C. 160.

(r) *Fitzer v. Fitzer*, 2 Atk. 514.

(s) 9 Ves. 87. ; but see the observations of Mr. Christian, in his *Bankrupt Laws*, 1 vol. p. 235. et seq. upon this case.

(t) It is usual not to include copyholds in provisional assignments, they not being liable to an extent : nor in general assignments to the assignees, a fine to the lord being thereby saved, the commissioners conveying in the first instance to a purchaser : this practice, however, has been objected to. It is right not to include copyholds in a provisional assignment, and this seems what was exclusively recommended in *Drury v. Man*,

1 Atk. 96., where Lord Hardwicke uses the words *temporary assignment* : but by the 13 Eliz. c. 7, s. 2. it seems imperative on the commissioners to assign to the assignees all the estate and effects of the bankrupt : See *Christian's Bankrupt Law*, 1 vol. 256. ; and therefore an assignment to the assignees, without including copyholds, seems unwarranted.

(u) *Higden v. Williamson*, 3 P. Wms. 131. ; and see *Worrall v. Marler*, in note to 1 P. Wms. 459. *Study v. Tingcombe*, 5 Ves. 695.

(v) *Moth v. Frome*, Amb. 394.

(w) *Ib.* Sed qu. whether a hope of succession is not assignable. See ante, 1 vol. p. 437.

(x) See 21 Jac. I. c. 19. s. 12.

(y) *Beck v. Welsh*, 1 Wils. 276.

but if the bankrupt covenanted for further assurance, he would in equity be compelled to suffer a recovery, and the assignees are bound by such covenant, and must, in such case, redeem the mortgage. (z)

*490 *Where the patron of a living is made a bankrupt, the advowson may be sold; but if the church be void at the time of the sale, the bankrupt must present, the void turn not being saleable. (a)

If a bankrupt be seized, for life, with a general power of appointment, with remainder, in default of appointment, to the heirs of his body, it has not been determined what is the effect of bankruptcy upon the power; (b) nor what would be the case between the creditors under the bankruptcy, and any appointee under the power, if the bankrupt attempted to execute it; nor whether, being a power of a general nature, having no specific objects, it is a power under which the bankrupt has an interest that would pass by the bankrupt laws to his assignees; but it has been held, that the bankrupt cannot be compelled by a decree in equity to execute a power for the benefit of his creditors. (c)

The assignees are entitled to the benefit of an equity of redemption; but not, it seems, of a covenant for the renewal of a lease. (d)

*491 Though in a lease there be a covenant not to assign without license, yet bankruptcy supersedes such a covenant, and the property passes under the commission, and may be assigned without license. (e)

A voluntary settlement after marriage is, by the statute, (f) void; as against creditors under a commission.

All property acquired by the bankrupt, before he obtains his certificate, belongs to his creditors: if, therefore, before his certificate, he again enters into trade, a second commission, whether

(z) *Pye v. Daubnez*, 3 Bro. 596. *Edwards v. Applebee*, 2 Bro. C. C. 652. *Mitford v. Mitford*, 9 Ves. 100.

(a) *Cooke's Bankrupt Law*, 1 vol. p. 304. edit. 6. *Christian's Bankrupt Law*, 1 vol. p. 262.

(b) *Thorpe v. Goodall*, 17 Ves. 338.; but see *Lord Townsend v. Wyndham*, 2 Ves. 482.

(c) *Thorpe v. Goodall*, 17 Ves. 338. 460. S. P. 1 Rose, 40.

(d) *Vandlenanker v. Desborough*, 2 Vern. 96. & but see what is said ante, 1 vol. p. 338.

(e) *Weatherall v. Geering*, 12 Ves. 512.

(f) *Jac. I. c. 15. s. 5.* *Walker v. Burroughs*, 1 Atk. 93.

joint or several, cannot be issued against him, for he cannot, unless there are very special circumstances, have any property whatever ;(g) but where an uncertificated bankrupt trades with the knowledge of his creditors, the creditors under the commission will, it seems, lose their priority.(h)

As an uncertificated bankrupt can acquire property only for the creditors, so, if he enters into trade in partnership, the creditors of that partnership have no equity against the assignees for an application of the property used and acquired in that partnership to the payment of their debts ;(i) unless the assignees have by their conduct excluded themselves from claiming such property.(k)

*If an estate comes to a bankrupt before he has obtained his certificate, a conveyance of it, it seems, may be made by the commissioners to the assignees in the usual manner, though the bankrupt has obtained his certificate before such conveyance is made ; though there is no decision on the subject ;(l) but if, after the certificate is allowed, there is an accession of property, the bankrupt takes it.(m)

The bankruptcy of one partner dissolves the partnership. The assignees are entitled not only to an account and distribution of the stock, &c. but also to a participation of subsequent profits ; made by the other partners carrying on the trade with the capital existing at the time of the bankruptcy ;(n) whether they are entitled to profits produced by a joint application of such capital, and other funds, has not yet been decided.(o)

It is sometimes laid down as a general rule, that assignees stand in the place of the bankrupt ; but this rule does not hold in every case ;(p) for assignees have all the equity the creditors have, and may impeach transactions, which the bankrupt could not ;(q) for instance, where there is a *voluntary conveyance* by a

(g) *Ex parte Martin*, 15 Ves. 114.

(h) *Troughton against Gittay*, Ambl. 630.

(i) *Everett v. Backhouse*, 10 Ves. 34. ; and see *Ex parte Martin*, 15 Ves. 114.

(k) As in *Troughton v. Gittay*, Ambl. 630.

(l) See 1 *Christian's Bankrupt Law*, p. 168.

(m) *Jacobson v. Williams*, 1 P. Wms. 336. ; and see *Moth v. Prome*, Ambl. 394.

(n) *Crawshaw v. Collins*, 15 Ves. 218. See also *Featherstonhaugh and Fenwick*, 17 Ves. 309.

(o) 15 Ves. 218.

(p) *Tyrrel v. Hops*, 2 Atk. 582.

(q) *Anderson v. Marby*, 2 Ves. jun. 255.

bankrupt, the court, it hath been said, may carry it into execution *493 tion *against the bankrupt himself,(r) but not against his assignees.(s)

Offices, which do not concern the administration of justice,(t) have been held liable to the bankrupt's debts. Such as the office for taking care of the palace and the house of lords, granted to one, his executors and administrators, for thirty-one years.(u)

So the office of *under-marshal* may be sold,(v) but not the place of Jew-broker.(w)

Lord *Hardwicke* thought, that, if an officer in the army became bankrupt, he had power to lay hands on his pay, for the benefit of his creditors;(x) but this doctrine has been overruled.(y)

Property possessed by a bankrupt in *autre droit*,(z) as factor, executor, or trustee, for instance, does not pass under the commission.

Where an executor becomes a bankrupt, the commissioners cannot seize the specific effects of his testator, not even in money, which cannot be specifically distinguished and ascertained to belong to such testator, and not to the bankrupt;(a) and *494 where assignees shall possess *themselves of effects which belonged to the bankrupt as executor only, the court, on a bill filed;(b) will, for the securing such effects, appoint a receiver, to whom the assignees shall account for so much as they have got in of the testator's estate.(c) Where a bankrupt is an executor and *residuary legatee*, and has paid the debts and particular legacies out of part of the assets, if he refuses to collect in the rest, notwithstanding the assignees have not the legal in-

(r) Sed vid. ante, 1 vol. p. 326, etc.

(s) *Tyrrel v. Hope*, 2 Atk. 562.

(t) As to which, see 5 and 6 Edw. VI. c. 16.

(u) *Schellinger v. Blackerby*, 1 Ves. 347.

(v) *Ex parte Butler*, 1 Atk. 210. 215. S. C. Amb. 73.

(w) Amb. 89. *Ex parte Lyons*.

(x) *Ex parte Butler*, 1 Atk. 214.

(y) *Flarty and Odham*, 3 Durn. and East, 681. *Lidderdale and Duke of Montrose*, 4 Durn. and East, 248.; and

see *Stone and Lidderdale*, 2 Amstr. p. 539.

(z) *Caffrey v. Darby*, 6 Ves. 496. *Copeman v. Gallant*, 1 P. Wms. 314.

Ex parte Marsh, 1 Atk. 159.; and see 1 *Cooke's Bankrupt Law*, 1 Vol. 391., 6th edit., and the cases there cited.

(a) *Howard v. Jemmett*, 3 Burr. 1369.

(b) *Ex parte Tupper*, 1 Rose, 179.

(c) *Ex parte Ellis and others*, 1 Atk. 101.

terest vested in them, the court would assist them to get in the remainder in the name of the executor.(d)

Where goods consigned to a *factor* remain *in specie*, and are found in his hands at the time of the bankruptcy, they do not pass under the commission; and where goods so consigned are sold, and the factor took *notes* instead of money, they do not pass.(e)

By the 36 Geo. III. c. 90., when a trustee of stock becomes a bankrupt, the courts, in any cause depending therein, may order stock to be transferred, together with the dividends, into the name of the accountant general of the court of chancery, or the deputy remembrancer of the exchequer, in trust, in such cause, or otherwise to and into the name or names of the person or persons equitably or beneficially entitled to the same.

*All the personal property, present or future, as well as the *495 real property of the bankrupt, passes (as hath been observed) by the assignment of the commissioners to the assignees; and though goods belonging to the bankrupt have been mortgaged, yet, if the bankrupt has been permitted to *continue in the possession, order, and disposition* of them, they will, in virtue of the act,(f) be considered as his, and pass to the assignees;(g) but this doctrine applies only where there is the consent of the owner to leave the goods in the power of the bankrupt, (possession only not being sufficient,) or, a laches in letting them remain there, so as to gain him a false credit.(h)

If, for instance, there be a mortgage or a sale of goods, and the vendor does not deliver them at the time appointed, but, on trover against him, keeps the vendee at arm's length, and in the mean time becomes bankrupt, this would not be considered as leaving the goods, by the vendee, in the possession of the bankrupt within the act.(i)

The words in the act,(k) "in his order and disposition, with the consent of the true owner," means, where the possession, order, and disposition, is in a person who is not the owner, to

(d) Ex parte Butler, 1 Atk. 213.

(h) West and Skip, 1 Ves. 243.; and

(e) Ex parte Dumas, 1 Atk. 234. S.

see Flyn v. Matthews, 1 Atk. 185.

C. 2 Ves. 585.

(i) See West and Skip, 1 Ves. 244.,

(f) Ryall v. Rowles, 1 Ves. 349. S.

where this, and other cases of the kind, are put by Lord Hardwicke.

C. 1 Atk. 164.

(g) Bourne v. Dodson, 1 Atk. 156.

(k) 11 and 12 Geo. III. c. 8. s. 9.

whom they do not properly belong, and who ought not to have
 *496 them, but whom the owner *permits, unconscientiously, as the act supposes, to have such order and disposition. The object was, to prevent deceit by a trader, from the visible possession of a property to which he was not entitled. But in the construction of the act, the nature of the possession has always been considered, and the words have been construed to mean, possession of the goods of another, with the consent of the true owner.(l)

Debts and chattels of the bankrupt, if they remain in the possession, order, and disposition of the bankrupt, at the time of the bankruptcy, will pass by the assignment to the assignees. In order to divest the bankrupt of such debts, he must have done every thing that is equivalent to a delivery of chattels personal; that is, of moveable goods. That which is equivalent to delivery of moveables is, in the case of a debt, an *assignment and delivery of the security*, if any, and *notice to the debtor of the assignment*.(m)

But the assignment of a mortgage debt is good, without notice to the mortgagor.(n)

An assignment of a *ship* at sea, for a valuable consideration, is good against the assignees of a bankrupt, though no possession is taken thereof.(o)

Where a person, about to commit an act of bankruptcy, *voluntarily, and without any pressure*, delivers over effects to a particular creditor, this *is a void transaction. It is otherwise
 *497 where the debtor is pressed by the creditor for his demand, and the debtor gives him a security, a mortgage for instance; it cannot be defeated.(p)

Certificates of the East-India Company, on payment into their treasury in India, and a navy bill remitted, endorsed by the testator to his agent in England, being at the time a creditor, were, after the bankruptcy of the agent, and deaths of the testator and bankrupt, held not to pass to the assignees, no evidence of appropriation being produced.

(l) 1 Sch. and Lefr. 337.

(o) Bourne v. Dodson, 1 Atk. 154.

(m) Jones v. Gibbons, 9 Ves. 410.

Browne v. Heathcote, ib. p. 160.

(n) Ib. 411. See ante, 1 Vol. 435, 436.

(p) Ex parte Scudamore, 3 Ves. 88.

So, it seems, if bills be remitted to a bankrupt for a *special purpose*, as to pay acceptances, such bills do not belong to his assignees.(p)

A *compensation*, under the London docks' act, to the proprietors of ancient privileged quays, was held to pass under a commission of bankruptcy.(q)

If the bankrupt, before his bankruptcy, deliver a promissory note to a creditor, payable to the bankrupt or order, but without any endorsement, he may, after his bankruptcy, endorse the bill, and, if he refuses, on a petition against the bankrupt and the assignees, praying for an order for the endorsement, an order for that purpose will be made, and with costs.(r)

**Proof of Debts.*

*498

If a person *claims* (the word used in the statute, but which, probably, means *proves*) a debt not due, he forfeits double the amount, and is liable to a prosecution for perjury.(s)

Debts may be proved at any of the public meetings appointed by the commissioners.(t) If the creditor lives above twenty miles from the place where the commission is executed, his deposition is admitted. Any creditor may, at his own expense, have at any time a meeting for the purpose of proving his debt; but it ought to be advertised in the gazette, that other creditors may attend, if they think proper, to oppose the proof: and, it seems the practice, to admit the proof of any other debt at such meeting, if the creditor will contribute his proportion to the expense of the day, and the assignees admit the fairness of such debt.(u)

Formerly the rule was, that no debt could be proved which did not exist at the time of the act of bankruptcy, upon which the commission was founded; but now, by 46 Geo. III. c. 135., all debts *bona fide* contracted *before the date of the commission*, may be proved, provided the creditor had no notice of a prior act of bankruptcy, and the bankrupt is discharged, by his certificate, from all debts so proveable.

*The common proof before the commissioners is the oath of *499

(p) *Hassall v. Smithers*, 12 Ves. 121.

(s) 1 Jac. I. c. 15. s. 11.

(q) *Chandler v. Gardiner*, quot. 17 Ves. 338. 343.

(t) 1 Christian's Bankrupt Law, 249.

(u) *Ib.*

(r) *Ex parte Greening*, 13 Ves. 206.

the creditor, which is binding, unless the commissioners, the bankrupt, or the other creditors, object to it, and then it is examined, and an appeal lies from the determination of the commissioners, to the great seal, by petition : (v) though at first it was doubted whether the chancellor had jurisdiction to interfere on such appeal. (w) If no objection is made, in a reasonable time, such proof by oath is conclusive; if reasonably objected to, it is admitted only as a *claim*.

Claims, also, are admitted where accounts are not completely balanced, so as to enable the creditor to swear to the exact sum; and in many other cases, where further steps are required before the demand can be fully substantiated; and a dividend is reserved upon them in the hands of the assignees; but if such claim is not made good before a second or final dividend, the commissioners may strike it out, (x) unless good reason be given for its continuance; and where a claim is substantiated after the dividend made, and no reservation of a dividend upon the claim, the creditor is only entitled to his share of the future dividends; but where there has not been gross laches, the chancellor will order that such creditor *shall be paid out of the money in the assignees' hands, before another dividend is made, what would have been payable to him if he had proved before the previous dividends were made. (y)

A creditor cannot present a petition to prove his debt, unless he has been before the commissioners; and his petition must state what passed before the commissioners. (z)

All petitions in bankruptcy must, before they are presented for hearing, be signed by the petitioners, except in cases of partnership or absence from the kingdom: in the former case, the signature of one of the partners is sufficient, and in the latter, the petition must be signed by the person presenting the same, on behalf of the person so abroad; and the signature of each person signing as a petitioner, must be attested by the so-

(v) See *Bromley v. Goodere*, 1 Atk.

77. : *Clarke v. Capron*, 2 Ves. jun. 666.

(w) 1 Cha. Gas. 276. See ante, p. 483. and the forcible observations on this subject, by Mr. Christian, there referred to.

(x) 1 Christian's Bank. Law, 325. ;

but see 1 Cooke's Bank. Law, 271. edit. 6.

(y) 1 Cooke's Bankrupt Law, p. 271. edit. 6. ; and see 1 Sch. and Lefr. 242.

(z) *Ex parte Wright*, 2 Ves. jun. 42.

licitor actually presenting the petition, or by some person who shall state himself in his attestation to be attorney, solicitor, or agent of the party signing in the matter of the petition.(a)

When a creditor applies to prove a debt, he must swear as to whether he has a security or not; and if he has, and insists upon proving, he must deliver it up for the benefit of the creditors, unless it be a joint and several security from the bankrupt and another person, in which case he may prove his debt, without delivering up the joint security; he being entitled to recover *what he can from the cosecurity, and take his divi- *501 dend upon the whole of his demand, provided he does not receive more than twenty shillings in the pound in the whole.(b)

A joint creditor cannot prove under a separate commission, for the purpose of receiving a dividend, except where he is a petitioning creditor.

There is no jurisdiction in bankruptcy over a creditor who does not come in under a commission; but if a creditor applies to prove a debt, he must, in general, answer questions put to him. Even a purchaser for a valuable consideration, without notice, may be compelled to disclose the infirmity of his title.(c) The creditor may be examined as to ~~various~~ transactions; and, in bankruptcy, if a deed is usurious, a party whose debt is tainted with usury is not, as in proceedings in equity, allowed what was actually advanced.(d) No person is compellable to answer questions which have a tendency to criminate him; but if a creditor refuses to answer, he is not permitted to prove.(e)

The commissioners are to determine at the hazard of an action, whether the questions are such as the person is bound to answer; and the chancellor will not interfere with their discretion on the subject, by an order upon them to enforce *answers *502 from a person examined as to the bankrupt's property received by him.(f)

It hath been determined, that if, after a docket struck, the creditor takes security or satisfaction, the effect of that transaction

(a) Vid. Order, 12 Aug. 1809.

(d) *Beesfield v. Solomons*, 9 Ves. 85.

(b) 1 *Cooke's Bank. Law*, p. 138, *Ex parte Skip*, 2 Ves. 499.

139., edit. 2. (e) *Ex parte Symer*, 1 Ves. 351. S. C. MS.

(c) *Ex parte Herbert*, 13 Ves. 187.

(f) *Ex parte Farr*, 9 Ves. 513.

under the statute, (f) though no commission issued, was not only a forfeiture of what was so received, and an act of bankruptcy, but that the debt was destroyed; (g) but, in a subsequent case, Lord Eldon held, that the debt is not in such case destroyed, unless a commission also is issued. (h)

If a creditor receives money or goods from a bankrupt, after an act of bankruptcy committed, the payment will be good, if the creditor had no notice of the bankruptcy; (i) but if a creditor obtains goods from his debtor, on credit, just before he breaks, he will not be allowed to prove the sum remaining due to him, *unless he gives up the goods.* (k)

An equitable creditor cannot take out a commission, but a debt either in *law* or *equity* may be proved under a commission; (l) and in deciding upon the proveableness of debts, the chancellor is understood to govern himself as to *legal debts*, by the rules *503 of law, and as to *equitable debts*, *by the rules of equity; regarding the claims of each creditor as a suit depending. (m)

What are good *legal* debts, and proveable as such, is a pure question of law; and on a plea of bankruptcy, and a certificate is determined upon by courts of law, and therefore will not here be treated upon: and with regard to what is a good *equitable* debt, as to which courts of law have no cognisance, so much has already been observed in the foregoing parts of this work, that little remains to be said.

All debts recoverable in a court of equity by trustees, legatees, and others, may be proved under the commission; though, as before observed, they will not support a commission; so, they may be set off, and are barred by the certificate. And though a debt could be recovered in a court of law, yet, if the chancellor would restrain the action by an injunction, the commissioners ought not to admit it in bankruptcy, even if a judgment is obtained in a court of law. (n)

The *consideration* of every debt attempted to be proved, may

(f) 5 Geo. II. c. 31. s. 24.

(g) Ex parte Gedge, 3 Ves. 349.

(h) Ex parte Browne, 15 Ves. 474.

(i) Hawkins v. Penfold, 2 Ves. 550.

(k) Ex parte Smith, 3 Bro. C. C. 48.

(l) Ex parte Murphy, 1 Sch. and Lefr. 48.

(m) Ex parte Dewdney, 15 Ves. 498.

Ex parte Williamson, 2 Ves. 252. Jeff v. Wood, 2 P. Wms. 128.

(n) 2 Christian's Bank. Law, 474.

be impeached before the commissioners. Even a *judgment* may be so impeached.(n)

Where executors become bankrupt, after misapplying the assets, the debt may be proved under *the commission, although *504 no account has been previously taken, or decree for payment pronounced.(o)

A legacy due from an executor, who admits assets, is in equity a debt due from such executor, and proveable under a commission against him ; (p) and where an executrix married, and her husband and she admitted assets on a bill filed against them, the assets, it was held, became a debt against the husband, and proveable under a commission against him.(q)

A legacy given to A. payable at twenty-one or marriage, with interest, is a vested legacy ; and if the executor becomes bankrupt, it may be proved under his commission, and will be barred by the certificate.(r)

An executor may prove under his own commission, for that which he is entitled to as executor against his own estate, but he will not be suffered to take the dividends.(s)

Under the bankruptcy of an executor and trustees, directed by the will to carry on a trade, and a limited sum to be paid by the trustees *for that purpose, the *general assets* beyond that *505 fund are not liable.(t)

Sums secured by *covenant*, in marriage settlements, if payable *certainly*, though in *future*, are proveable, with a rebate of interest ; but it is otherwise where the sum is payable on a *contingency* ; (u) as, in case the bankrupt's wife survives him ; (v) though in such case, if a *judgment* has been given to secure payment on the contingency, it might be proved.(w)

(n) Ex parte Bryant, 1 Ves. and Bea. 214.

(o) See Wheldale and Wheldale, 10 Ves. 379. where this doctrine stated and not denied ; and see Ex parte Leek, 2 Bro. C. C. 596.

(p) Jeff v. Wood, 2 P. Wms: 130.

(q) Ex parte Macwilliams, 1 Sch. and Lefr. 173.

(r) Waleot against Hall, 2 Bro. C. C. 305.

(s) See Ex parte Markland, 2 P. Wms. 546. Ex parte Shakeshaft, 3

Bro. 197. Ex parte Leek, 2 Bro. 596.

(t) Ex parte Garland, 10 Ves. 110. overruling Hankey v. Hammond, 1 Cooke's Bank. Law, p. 75. edit. 6.

(u) See Ex parte Mitford, 1 Bro. C. C. 398.

(v) Ex parte Groome, 1 Atk. 115.

(w) Ib. 117. Ex parte Mitchell, 1 Atk. 121.

Property of the wife, agreed to be settled by the husband, may be proved under his commission. (x)

If a person, in consideration of marriage, recites in a settlement, that he is possessed of two thousand pounds stock, and covenants with trustees to transfer to them immediately after the marriage, or on request, two thousand pounds stock for the benefit of his wife and children, and a request is made to him to transfer the same, and after such request he becomes bankrupt, and it turns out that he had no such stock at the time of his marriage, as recited in the settlement, the trustees may prove to the value of the stock and the arrear of dividends. (y)

*506 If no request had been made, no proof would have been admitted. (z)

If a settlement be made, previous to marriage, of money, the property of the wife, upon certain trusts, with a power to advance the husband so much on bond, and that the trustees should, when he thought proper, recover and receive the principal and apply the interest to the husband for life, if he should so long continue solvent, but if he should become bankrupt, then as other trusts, it was held that the amount of the bond was proveable under a commission against the husband. (a)

But a bond by a husband to pay a sum in the event of his bankruptcy or insolvency, cannot stand as against creditors. (b)

The widow of a bankrupt may prove to the amount of a sum agreed by his marriage settlement to be laid out. (c)

If there be an agreement to replace stock upon demand, and a demand is made before the bankruptcy, the price may be proved. (d)

A covenant within seven years, or when requested, to convey lands of a given value in particular counties, will not entitle the covenantee to prove in bankruptcy after the expiration of the

(x) Ex parte Cooke, 8 Ves. 353.

(y) Ex parte Campbell, 10 Ves. 248.; and see Ex parte Groome, 1 Atk. 114.

(z) See 16 Ves. 248.; and see Utterson v. Vernon, 3 T. R. 529. 4 T. R. 570.; and see what is said Ex parte Granger, 10 Ves. 360.

(a) Ex parte Hinton, 14 Ves. 502.

Lockyer and Savage, 2 Atk. 942.; see also Ex parte Cooke, 8 Ves. 353.

(b) Ex parte Cooke, 8 Ves. 353. Ex parte Hill, mentioned 2 P. Wms. 498. a. 1.

(c) Ex parte Gardner, 11 Ves. 44.; see also Ex parte Granger, 10 Ves. 349.

(d) Ex parte Mare, 8 Ves. 337.

seven years, and no request made; unless the covenant be secured by a penalty.(e)

A bond given on marriage to a trustee to pay so much to the wife, if she survives her husband, is contingent, and cannot be proved.(f)

Formerly, where there was principal and surety, and the surety paid the debt, he was entitled to have an assignment of the security, to enable him to obtain satisfaction for what he had paid above his own share;(g) and a surety in a bond might compel the principal creditor to prove the bond under the commission; and if the surety paid the whole, the creditor was held to be a trustee of the dividends for him.(h) And if a surety, before the bankruptcy, paid part of the debt, he might prove for so much as he had paid, even to the prejudice of dividends the bondholder would have had out of the estate;(i) but it was not decided, that, if the creditor receive part of his debt from a third person, not under any obligation to pay, he would have a right to receive dividends upon his whole proof.(k) Now, however, by a recent statute, any person who is a surety for, or liable for any debt of a bankrupt, if he has not had notice of an act of bankruptcy, or that he was insolvent, or had stopped payment, may prove *for what he pays in consequence of such surety: *508 ship, although the same be paid after the commission has issued, or if the principal has proved, is entitled to take the benefit of his proof; but if a dividend has been paid under the commission, previous to such proof by the surety, he is only entitled to share the benefit of the future dividends.(l)

By a general order,(m) a mortgagee (unless he is what is termed an equitable mortgagee, in which case a petition is necessary)(n) may, if he chooses, without a petition for that pur-

(e) *Ib.* 335.; and see *Ex parte Groome*, 1 Atk. 117.

(f) *Ex parte Caswell*, 2 P. Wms. 497. overruling *Holland v. Calliford*, 2 Vern. 602.

(g) *Ex parte Crisp*, 1 Atk. 135.

(h) *Ex parte Turner*, 3 Ves. 243. *Ex parte Rushforth*, 10 Ves. 409. *Payley and Field*, 12 Ves. 435.; and see *Ex parte Leary*, 6 Ves. 648.

(i) *Ex parte Wood*, noticed in *Ex parte Rushforth*, 10 Ves. 418.

(k) *Vid.* *Ex parte Rushforth*, 10 Ves. p. 413. in arg.

(l) 49 Geo. III. c. 121. s. 8.; and see *Ex parte Lloyd, Rose*, 4.

(m) *Vid.* General Order, 4 Bro. C. C. 550, 1.; and see 8 Ves. 105.

(n) *Ex parte Payler*, 16 Ves. 424. As to equitable mortgages, see ante, 1 Vol. p. 428.

pass, come in under the commission; and, in such case, the commissioners are empowered to scrutinize the mortgage, and take an account of what is due, and put up the mortgaged premises to sale, and out of the produce pay the expense of the sale, and what is due to the mortgagee for principal, interest, and costs, and the surplus, if any, to the assigners, or, if there be a deficiency, the mortgagee may prove to the amount of the same under the commission, but in such case he cannot charge interest beyond the date of the commission.(e)

The commissioners in these cases are authorized to direct all proper parties to join in the conveyance of the mortgaged premises to the purchaser.(f)

- *509 *But unless the mortgagor applies to prove his debt, the commissioners have no authority to dispose of his security against his consent;(g) and if a *second mortgagee* does not claim under the commission, but chooses to rest upon his security, he is not compellable to join in a sale obtained under the general order, by a prior mortgagee, which did not produce enough to satisfy both mortgages.(h)

If a son, having a remainder, joins his father in a mortgage, which is not paid off till after the bankruptcy of the father, the son cannot prove his interest under the commission.(i)

If a bill of exchange be lost, it may be proved under the commission, upon the giving of an indemnity against any claim in respect of the bill.(j)

In bankruptcy, the penalty of an *annuity bond* having become, in a certain sense, a debt, an equitable arrangement is made, by which the annuity creditor is neither confined on the one hand to the instalment then due, nor permitted on the other to claim the full penalty; but a *value* is set upon the annuity.(k) If the creditor rests upon the *covenant*, in such case, only the *arrears* of the annuity, actually *become due*, can be proved.(l)

- *510 *A *voluntary bond*, it has been held, may be proved, but that

(e) Ex parte Badger, 4 Ves. 185.

(f) 4 Bro. C. C. 561.

(g) Ex parte Jackson, 5 Ves. 357.

(h) Ex parte Jackson, 5 Ves. 357.

(i) Kitekat v. Raynes, 1 Bro. C. C. 394.

(j) Ex parte Greenway, 6 Ves. 812. 4.

(k) See Batchelor v. Churchill, 14 Ves.

574. Ex parte Le Compte, 1 Atk. 251.

Ex parte Belton, Ib. 251. Ex parte Artis, 2 Ves. 489.

(l) Ex parte Granget, 10 Ves. 351; see Fletcher v. Bathurst, 7 Vm. 71. pt.

the party cannot take any thing under the commission, unless there be a surplus after payment of all joint and separate debts, (w)

In a case of bankruptcy, a joint bond entered into by mistake has been considered as joint and several, (x)

A specialty creditor has the same right under the bankruptcy of the heir of the debtor, as if he had not become bankrupt, and may therefore follow the real assets, or their specific produce, in the hands of the assignees, (y)

A debt, which could not be recovered in an action against a plea of the statute of limitations, nor in equity by analogy to that statute, cannot be proved under a commission of bankruptcy, (z)

It seems, that a creditor, giving personal attendance before the commissioners, for the purpose of proving his debt, cannot be arrested, (a)

Of Lien, Set-off, and Stoppage in Transitu.

In determining upon the debt to be proved, questions as to a lien, or a set-off, often arise; but as points of this kind are mostly questions of law, it is not necessary to enter into all the doctrine on the subject. Factors, brokers, bankers, carriers, *511 attorneys, and others, may all insist on the lien, which the law has given them, the same not being taken away by a commission of bankruptcy.

If bills be sent for the purchase of specie, and, before such commission is executed, the agent becomes a bankrupt, the principal has a lien on the bills or produce of the same in the hands of the assignees; (b) for the bankrupt was only a trustee.

If the bill had been sent to buy goods, a doubt has been expressed, whether the party would have had a lien on the bills, (c)

If, upon a contract for the sale of a real estate, the purchase

(w) Assignees of *Gardner v. Skinner*, 2 Sch. and Lefr. 228.; but see the observation of Mr. Christian, 1 vol. Bankrupt Law, p. 174.

(x) Vid. case mentioned in 3 Ves. 400. in note.

(y) Ex parte *Morton*, 5 Ves. 449.

(z) Ex parte *Dewdney*, and Ex parte *Seaman*, 15 Ves. 479. See ante.

(a) Ex parte *King*, 7 Ves. 513, 514. 516.

(b) Ex parte *Sayer*, 5 Ves. 169.; and see Ex parte *Dumas*, 1 Atk. 332. 8, G. 2 Ves. 582.; and see 5 T. R. 215. 2 H. Black. 501.

(c) 5 Ves. 173.

money is not paid, and the purchaser becomes a bankrupt, the vendor has a lien on the estate for the purchase money.(d)

A packer may retain goods till he is paid the price of packing, and if he has another debt due to him from the bankrupt, he may retain the goods till such debt is paid;(e) but this, it seems, is because such is the understood agreement between packers and their employers.(f)

A person who repairs a ship has no specific lien, if delivered to the bankrupt: if repaired in a foreign port, while out upon a voyage, it would be otherwise.(g)

Without a usage or agreement, there cannot be, either in law or equity, a lien for a general balance.(h)

All debts which can be proved under the commission, may be set off or balanced against demands made by the bankrupt.(i)

A person may set off a debt under the bankrupt acts, though not relative to the mutual credit between him and the bankrupt.(k)

Lord Hardwicke seems to have thought that a court of equity does not go farther than a court of law, in cases of set-off;(l) but Lord Rosslyn held, that there may be an equitable set-off in case of bankruptcy, though there were no mutual debts upon which a set-off could be sustained at law,(m) as in some cases of fraud:(n) and a recent writer, in his excellent work on the bankrupt law,(o) has adduced very strong reasons to prove that the jurisdiction in bankruptcy relative to set-off was derived from the 13 Eliz. c. 7. s. 2. in the first instance, strengthened by the 4 and 5 Ann. c. 17. s. 11. which afterwards expired, and subsequently enforced by the full and clear enactment of the 5 Geo. II. c. 30. s. 28. but is wholly unconnected with the 2 Geo. II. c. 13. as to set-off, though many judges appear to have

(d) *Rowley v. Rogers*, 1 Cooke's Bank. Law, 139. edit. 6. Cowell v. Simpson, 16 Ves. 272. As to this lien, see ante, p. 106.

(e) *Ex parte Deane*, 1 Atk. 228.

(f) *Ex parte Ockenden*, 1 Atk. 237.

(g) *Ex parte Shank*, 1 Atk. 234.

(h) 1 Christian's Bank. Law, 291.

(i) 1 Christian's Bank. Law, 298.

(k) *Ryall v. Rolfe*, 1 Atk. 485. 2 C. 1 Ves. 376.

(l) *Ex parte Oxenden*, 1 Atk. 237. and see *Bishop v. Church*, 3 Atk. 691.

(m) *James v. Keymer*, 5 Ves. 106.

(n) *Ex parte Stephens*, 11 Ves. 24.

(o) See *Christian's Bank. Law*, p. 278.

acted upon a different opinion. It is, however, to be lamented, that if this construction, (favorable as it is to creditors, be just, and the opinion of Mr. Justice Buller be correct, that a set-off may be given in evidence at law, under the general issue, of the 5 Geo. II. c. 30. s. 28. (p) it follows, that an equitable set-off might be given in evidence, as it is allowed under the statutes in bankruptcy; and thus, contrary to the general policy of the state, the common law judges would have to determine upon a point of equity. How could they act in cases of fraud? If they have no jurisdiction in any case as to a set-off, where a bankruptcy has taken place, the inconvenience would be great, as the party, incapable of supporting a set-off at law, would be driven to obtain an injunction, (q) or rather, perhaps, to petition the chancellor. (r)

At law, there can be no set-off between joint and separate debts; (s) but it is not so in bankruptcy, where the chancellor having an equitable as well as a legal jurisdiction, and the assignees taking subject to all equities attaching upon the bankrupt, there are cases where, upon equitable principles, a separate debt due from a bankrupt has been allowed to be set off *514 against a claim by assignees of a joint debt, by principal and surety, due to him; (t) and other cases of the kind, where the equitable interference is on the ground of fraud, (u) or otherwise; (v) but where the court does not find a natural equity going beyond the statute, the construction of the law has been held to be the same in equity as at law. (w)

It seems, however, that, under a separate commission against one partner, a debt due by a separate creditor to the partnership cannot, from the inconvenience it would occasion, be set off against the claim of the separate creditor, notwithstanding the natural equity for doing so. (x)

(p) See what is said by him in *Grove v. Dubois*, 1 T. R. 112. cited, and seemingly approved by Mr. Christian, 1 Bank. Law, p. 263.

(q) See *Billon v. Hyde*, 1 Atk. 126.

(r) *Saxton v. Davis*, 1 Rose, 79.

(s) *Ex parte Quintin*, 3 Ves. 248.

(t) See *Ex parte Harrison*, 12 Ves. 346.; but see on this subject *Bishop v.*

(u) *Ex parte Stephens*, 11 Ves. 24.

(v) See *Ex parte Quintin*, 3 Ves. 248.; but see 11 Ves. 517. as to that case.

(w) 11 Ves. 27.; and see *Ex parte Christie*, 10 Ves. 105.

(x) *Ex parte Twogood*, 11 Ves. 517.;

.. If *A.* be indebted to the bankrupt before his bankruptcy, and a creditor upon him, in respect of a contingency taking place after the bankruptcy, it is not matter of set-off. (y)

.. An acceptance, not due till after the bankruptcy of the drawer, is capable of set-off, within the clause of the act (5 Geo. II. c. 30. s. 28.) as to mutual credit. (z)

.. A bond, though payable at a future day, may be set off. (s)

- *515 If bankers receive and pay money, on account of a bankrupt, after notice of an act of bankruptcy, all the sums received are considered as received for the use of the estate; and they cannot set-off the payments made, or be allowed to come in as creditors, and to claim dividends on debts paid which were owing before an act of bankruptcy. (b)

A debt due to *A.* from *B.* a bankrupt, in *autre droit*, cannot be set off against a debt due from *A.* to the bankrupt's estate. (c)

By the 46 Geo. III. c. 123. s. 3. in all cases, in bankruptcy, where there has been mutual credit, or mutual debts, there may be a set-off, notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit was given to, or the debt contracted by the bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided such credit was given to the bankrupt two calendar months before the date and suing forth of the commission, and provided the person claiming the benefit of such set-off had not, at the time of giving such credit, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent, or had stopped payment.

Direction of Creditor.

By a recent act of parliament, it is declared, that, from and after the passing of the act, it shall not be lawful for any creditor, who has, or shall have brought any action, or instituted any

*516 suit, against any bankrupt, in respect of any demand which arose prior to the bankruptcy, or which might have been proved as a debt under the commission; to prove a debt under such

and see *Ex parte Christie*, 10 Ves. 105.

See the doubt expressed in *Ex parte Edwards*, 1 Atk. 100.

(y) *Ex parte Groome*, 1 Atk. 119.

(z) *Ex parte Wagstaff*, 13 Ves. 65.

(a) *Ex parte Prescott*, 1 Atk. 200.

(b) *Hankey against Vernon*, 3 Bro. C. C. 313.

(c) *Bishop v. Chatch*, 3 Atk. 691.

commission for any purpose whatever, or to have a claim entered, without relinquishing such action or suit, and all benefit from the same; and that the proving or so claiming a debt, shall be deemed an *election* to take the benefit of such commission; with respect to the debt so proved or claimed by him; but it is provided, that such creditor shall not be liable to the payment to the bankrupt or his assignees, of the costs of such action or suit, which shall be so relinquished by him; and it is also provided, that, where the creditors shall have brought any action or suit against such bankrupt jointly, with any other person or persons, his relinquishing such action or suit against such bankrupt or bankrupts shall not in any manner affect such action or suit against such other person or persons. (d)

This statute renders it unnecessary to consider most of the cases on the subject of election determined previous to it:

If a bankrupt is taken in *execution*, after a commission is issued, the creditor is considered as having made an *election*; (e) but if the creditor has the bankrupt in *execution* at the time the commission issues, he may elect; (f) but is not bound to elect before a dividend. (g)

*A creditor is not in general put to an election, until he has had an opportunity of ascertaining, whether it will be most for his benefit to proceed at law, or come in under the commission; an opportunity which creditors in general cannot have until a dividend is declared; (h) and, therefore, till a dividend is made, they are not compellable to elect; (i) but there is an exception to this rule in the case of an assignee, who has not claimed or proved his debt; (k) and has *delayed* making a dividend; in which case, if he has any fund in his hands, the chancellor will oblige him to elect within a given time. (l)

It has been held, that, if a creditor has demands upon the bankrupt of *distinct natures*, or in *different rights*, he is at liberty to prove one under the commission, and proceed at law for

(d) 40 Geo. III. c. 121. s. 14.

(e) Ex parte Cator, 3 Bro. G. C. 210.

Ex parte Warder, 3 Bro. C. C. 191.

Ex parte Knowel, 13 Ves. 102.

Ex parte Pammet, 14 Ves. 122.

(f) Ex parte Knowel, 13 Ves. 102.

(g) Ex parte Warwick, 14 Ves. 136.

(h) Ex parte Sharpe, 11 Ves. 204.

The rule has given rise to some very oppressive conduct, as in the case Ex parte Callow, 3 Ves. 1.

(i) Ex parte Sharpe, 11 Ves. 203.

(k) Ex parte Ward, 1 Atk. 153. 49

Geo. III. c. 121. s. 14.

(l) Ex parte Grosvenor, 14 Ves. 587.

the recovery of the other; (m) as a *joint debt* and a *debt by simple contract*; or a *bond*, and demand for rent: (n) nor is this doctrine affected by the late statute (o), but where the creditor might comprise the whole demand in one action, as for goods sold at different times, he is not permitted to split it, and proceed at law for part, and come under the commission for another part. (p)

*518 *The petitioning creditor is considered as having made his election, (q) and not only as to the debt upon which the commission is founded, but as to all debts due to him from the bankrupt. (r)

Where, in cases of partnership, there are joint and separate commissions, persons who are both joint and separate creditors must elect whether they will claim upon the joint or separate fund; nor does a creditor on a *joint and separate bond* lose his right to elect, by having a bill drawn in the joint names of the creditors, on third persons, endorsed to him. (s)

If a bankrupt surrenders in discharge of his bail, and the creditor does not proceed to charge him in execution, in consequence of which he is discharged, it does not amount to an election. (t)

Stoppages in Transitu.

Questions as to *stoppages in transitu* are questions of law, and will, therefore, be very shortly observed upon. The right of stopping *in transitu* is not favoured. (u)

It has been holden, that the consignor cannot stop against the assignee of the consignee. (v)

(m) Ex parte Grove, 1 Atk. 105.; and see Ex parte Matthews, 3 Atk. 816.

(n) See Ex parte Botterill, 1 Atk. 106.; Ex parte Grosvenor, 14 Ves. 589.; and see Ex parte Crinsoz, 1 Bro. C. C. 270.

(o) 49 Geo. III. c. 121. s. 14.

(p) Ex parte Grosvenor, 14 Ves. 587.; and see Ex parte Matthews, 3 Atk. 817.

(q) Ex parte Hopkinson, 1 Ves. jun.

159. Ex parte Lewis, 1 Atk. 154; Ex parte Ward, 1 Atk. 153. Ex parte Callow, 3 Ves. 2. Ex parte Bryant, 2 Ves. and Bea. 215.

(r) 1 Cooke's Bankrupt Law, 30; Gregg's edit.

(s) Vid: Ex parte Hay, 15 Ves. p. 4; Ex parte Rowlandson, 3 P. Wms. 405.

(t) Ex parte Outdell, 6 Ves. 446.

(u) 1 New Rep. 63.

(v) Lickbarrow v. Mason, 2 T. R. 63. reversed in error, 1 H. Bl. 357. and

Where there is a sale, before a bankruptcy, of a chattel interest, and it has proceeded to the length, that either a total delivery has followed, or such a partial delivery, as both in law and equity prevents the stoppage *in transitu*, the property is vested in the purchaser, and belongs to the assignees.

There is no instance of a stoppage *in transitu* being allowed, where there has been a *delivery of part*; (w) but *part payment* does not take away the right to stop *in transitu*; (x).

Surrender and Examination of Bankrupt.

By the 5 Geo. II. c. 30. s. 5. the bankrupt has forty-two days to surrender after notice left at his house; or personal notice, if in prison, and advertisement in the gazette; but this time for surrendering may, at the instance either of the bankrupt or his assignees, (y) be enlarged by the chancellor, for a term not exceeding fifty days. If the bankrupt does not surrender within the time prescribed, he is guilty of a felony.

If the bankrupt does not surrender within the time prescribed by the act, (5 Geo. II. c. 30. s. 5.) he may, by petition to the chancellor, state the circumstances which prevented his surrender, such as *illness*, for instance; (z) and pray for an order, that the commissioners may be at liberty to appoint a meeting, and to take the surrender; (u). *An order to this effect leaves the commissioners an option, whether they will admit the bankrupt to surrender, or not; nor does it bar a prosecution for not surrendering; (b) but is only a sort of intimation that the chancellor does not think it fit that he should be capitally prosecuted. If an indictment was preferred, a *pardon* would be granted. (c) An omission to surrender, if not wilful, is not a felony. (d) Lord *Macclesfield*, in cases of this kind, where the bankrupt had from

on appeal to house of lords, new trial ordered, 2 H. Black. 311. See Mr. J. Buller's judgment in house of peers, 6 East, 21. On the new trial, the K. B. retained their former opinion.

(w) See *Hammond v. Anderson*, 1 New Rep. 63. Ex parte Gwyne, 12 Ves. 383.

(x) *Hodgson v. Long*, 7 T. R. 440.

(y) *Fuller's case*, 10 Ves. 189.

(z) Ex parte Bould, 2 Bro. C. C. 49.

(a) Anonymous case, 15 Ves. p. 1.

See also Ex parte Jackson, 1b. p. 119.

Fuller's case, 10 Ves. 496. *Higginson's*

case, 12 Ves. 496. and Ex parte Gra-

ham, 2 Bro. C. C. 48.

(b) Ex parte Ricketts, 6 Ves. 445.

(c) Ex parte Lavender, 18 Ves. 19.

(d) Amb. 307.

ignorance or accident not attended his examination, would supersede the commission in order to prevent a prosecution; (e) but his authority to do so has been questioned. (f)

After the order the bankrupt has still an option whether he will surrender or not; and if he does not, it seems, it would not be a contempt. (g)

Whether the bankrupt, after such an order to surrender, may be taken in execution by a creditor before the time has expired, does not appear to have been determined. (h) It has however been decided, that he cannot be arrested. (i)

In a case where a bankrupt had escaped from prison, and was retaken by the gaoler upon his return from an examination on a surrender, under the lord chancellor's order, after the time *521 prescribed by the statute for his surrender, it was not considered as a contempt, and he was held not entitled to his discharge. (k)

It seems doubtful whether, in these cases, where the party has not surrendered in time, he is entitled to his certificate, and can be considered as having conformed to the statutes. (l)

The bankrupt is not bound to surrender until the last meeting; but if the commissioners have reason to think the bankrupt intends to secrete his effects, they may summon him to be examined in the intermediate period, between the finding of the bankruptcy and the time appointed for his examination. (m) And after a bankrupt has passed his examination, he may at a subsequent day be further examined; (n) and is compellable to attend. (o)

So, a bankrupt, if he chooses, may surrender immediately upon his being adjudged a bankrupt, and before the first meet-

(e) *Ex parte Wood*, 1 Atk. 222.; and as never having been out of custody. see *Ex parte Lavender*, 18 Ves. 18.

(f) See 1 *Christ. B. L.* 125.

(g) *Ex parte Johnson*, 14 Ves. p. 41.

(h) 15 Ves. p. 1.

(i) In matter of *Dalton*, 1 Ball and Smith, 130.; and see *Davis v. Trotter*, 8 T. R. 130.

(k) *Ex parte Johnson*, 14 Ves. p. 36. I think I have heard Lord Eldon say, the ground of the decision is that case was, that the bankrupt was considered

(l) See *Ambler*, 308. and 1 *Christian's Bank. Law*, 129.

(m) *Ex parte Lingood*, 1 Atk. 240. Fuller's case, 10 Ves. 183.

(n) *Davis v. Trotter*, 3 Esp. N. P. 40. *Rex v. Perrot*, 3 Barr. 1124. cit. 1 *Cooke*, 448. edit. 6.; and see 5 *Geo. II. c. 30. s. 1.* which seems to enforce such examination, as observed by Mr. *Christian's Bank. Law*, 1 vol. p. 188.

(o) See *Anon.* 14 Ves. 451.

ing at Goldhall; and this is usually done; as the bankrupt, by such surrender, becomes free from arrest for forty-two days from the time of his surrender, (p) and for the time during which such examination is adjourned. (p)

*To avoid the inconvenience of the attendance of commissioners in prison to take the examination of bankrupts charged in execution, according to the statute, (q) it is provided by the 49 Geo. III. c. 121. s. 13. that bankrupts taken in execution may, on their last examination, be brought before the commissioners, as in cases of custody under mesne process. (r) *522

The examination of the bankrupt as to particular points cannot be prevented by an agreement of the friends of the bankrupt to pay a sum of money; such agreement is not binding, it being contrary to the policy of the bankrupt law, and having the effect of suppressing an examination, which is necessary to ascertain, among other things, whether or not the bankrupt is entitled to his certificate; (s) but a covenant by a friend of the bankrupt to pay all his creditors their full debt, in consideration that they will not proceed any farther under the commission, is good; (t) an agreement, however, of this description, would probably be considered as void, if made under circumstances which might entitle it to the denomination of compounding a felony.

Let a bankrupt's conduct be ever so improper, he is entitled, under the 5 Geo. II. c. 30. s. 5. to an inspection of his books with a view to his examination. (u)

*If, on the examination, it can be made out that the bankrupt *523 has concealed, or has not delivered up a particular book, he may be indicted under the statute. (v)

The question, *as to what a bankrupt may be examined*, is a question of law.

If commissioners commit a bankrupt for not answering, or for answering in an unsatisfactory manner, the bankrupt may, by an *habeas corpus*, have the propriety of the questions, or

(p) Ex parte Wood, 18 Ves. 1. S. C. mentioned 1 Christian's B. L. 131.

(q) See 5 Geo. II. c. 30. s. 6.

(r) 5 Geo. II. c. 30. s. 6.

(s) As to which see 5 Geo. II. c. 30. s. 6.

(t) *Nerott v. Wallace*, 3 T. R. 17.

(u) *Kaye v. Boulton*, 6 T. R. 134. 1 Cooke, 459. edit. 6.

(v) Ex parte Ross, 17 Ves. 376.

(v) *Ib.* 378.

the sufficiency of the answer, determined upon by the chancellor, or the common law judges.(w)

If a commitment be illegal, an action lies against the commissioners.(x)

When commissioners commit a person, the chancellor will not interfere upon petition.(y) he can do no more than grant an *habeas corpus* to bring up the party; but this is not in virtue of his statutory authority in bankruptcy, but in virtue of his statutory authority under the *habeas corpus* act:(z) and if the commitment is legal, the chancellor has not a discretionary authority to discharge him upon circumstances.(a)

*524 It has been held, that it is not a fatal objection to a commitment of a bankrupt by the commissioners, that the order of commitment was made "in the absence of the bankrupt, and that it bore date the day the examination took place, though made some days afterwards.(b)

A bankrupt may be committed by the commissioners, though, upon his examination, he swears *positively*, if his answers are not *reasonably satisfactory*.(c)

If a question be asked of a bankrupt, the answer to which might subject him to a prosecution for felony, he may, it seems, demur to the question; and if he is committed for not answering, the chancellor on an *habeas corpus* would discharge him; but he is bound to answer what may subject him to penalties; smuggling or gaming transactions for instance.(d)

If one who has received the bankrupt's money refuses to account for it, as his answer may subject him to penalties, he will be considered as liable to the amount, and as having so much still in his hands.(e)

(w) See *Ex parte Lingood*, 1 Atk. 242.

(x) *Perkins v. Proctor*, 2 Wils. 382. *Miller v. Seare*, 2 Bl. 1141.

(y) *Taylor's case*, 8 Ves. 300. *Horne v. Lacey*, 1 Dick. 170. *Ex parte Tomkinson*, 10 Ves. 106. *contra*, *Ex parte Lingood*, 1 Atk. 342.

(z) See *Ex parte King*, 11 Ves.; and see *Ex parte Page*, 17 Ves. 60.

(a) *Ex parte Newlan*, 11 Ves. 521.

(b) *Salt's case*, 13 Ves. 361.

(c) *Taylor's case*, 13 Ves. 323. *Ex parte Pedley*, cit. 1 Cooke B. L. 462. last edit. *Ex parte Nowlan*, 6 T. R. 118. The case *contra*, *Pedley's case*, Leach 365, is not considered as law.

(d) *Ex parte Meymot*, 1 Atk. 200.

(e) *Ex parte Symes*, 11 Ves. 521.

Assignees.

By the 5 Geo. H. c. 30. it is enacted, "That the commissioners shall forthwith, after they have declared the person against whom a commission shall issue a bankrupt, appoint a time and place for the creditors to meet, in order to choose an assignee or assignees of the said bankrupt's estate and effects."

*This choice of assignees is given to the majority of the creditors in order present at such meeting, (a) having debts to the amount of 10*l.* and upwards, as persons the most interested in the distribution of the property, subject to a control, by the chancellor, the largest, most general, and unqualified of any of the authorities given to him in bankruptcy. (b) The Commissioners, upon the day for choosing assignees, which is always at the second meeting, are not to examine critically into the debt, but to admit creditors for what they swear is due to them; as they are liable to account afterwards; (c) but though the creditor swears positively, yet, if the commissioners have just grounds to doubt the fairness of the debt, they do right to admit it only as a claim. (d) The circumstance of some of the creditors, whose votes would have turned the scale, being absent abroad, (e) or by accident, will not invalidate the choice; but it would be different if creditors were kept back by fraud. (f) *525

If the debt of one creditor be as great as to amount to more in value than the other debts, he may choose himself as assignee. (g)

Separate creditors cannot vote for assignees under a joint commission, unless the joint creditors are paid in full; nor can joint creditors vote in the choice of assignees under a separate commission. (h) *526

The assignees thus chosen are entitled to the custody of the papers, usually termed the proceedings, under the commission. (i)

(a) 1 Atk. 60.

(b) Ex parte Surtees, 12 Ves. 12.

(c) Ex parte Simpson, 1 Atk. 63.

(d) Ib. 71.

(e) See Ex parte Grignier, 1 Atk. 80.

(f) Ex parte Surtees, 12 Ves. 12.

(g) 1 Cooke's Bankrupt Law, 276. Gregg's edition.

(h) Ex parte Parr, 1 Rose, 78. See the remarks of Mr. Christian on this subject, 1 Bankrupt Law, 280. and Ib. 2 vol. p. 179.

(i) Ex parte Scarth, 15 Ves. 293.

The attendance of a bankrupt on the assignees, to assist them in making out the accounts of his estates, seems to be confined by the 5 Geo. II. to the forty-two days, or the enlarged time at most; but if the assignees will undertake for the creditors under the commission, that they shall not arrest him, the court will order him to attend, notwithstanding any risk he may run from his creditors at large. (k)

The assignees represent the creditors, and can bind them, for purposes connected with their trust of distributing the property under the bankrupt law; but have no authority, it seems, to enter into an agreement disposing of the surplus of the bankrupt's estate after payment of 10s. in the pound. (l)

By the 49 Geo. III. c. 121. s. 3. if the creditors do not direct how the money arising from the bankrupt's estate shall be paid in, the commissioners have authority given them for that purpose, and may, upon the application of the assignees, or any five or more of the creditors, and notice to the assignees, order the money paid in as be intimated in exchequer bills. *527

It is the duty of the assignees to sell all the bankrupt's property, as soon as it can be done with advantage; and an assignee of a bankrupt is not justified in deferring a sale of a bankrupt's estate, though with the honest view of procuring more money for it, (m) unless all the creditors agree; for if any one individual creditor refuses to defer the sale, and a loss is incurred by not selling, the assignees, it seems, will be compelled to make good such loss. (n) The chancellor does not give directions about the mode of selling the estate as in sales before the master; but that is left to the commissioners, who will sell in the manner they think most advantageous. (o)

In a former part of this work, (p) some observations have been made as to the title which assignees are bound to give on a sale by them.

By the 49 Geo. III. c. 121. s. 5. particular directions are given respecting the examination, by the commissioners, of the

(k) Ex parte Turner, 1 Atk. 148.

(l) Ex parte Barft, 12 Ves. 15.

(m) See on this subject, Ex parte Goring, 1 Ves. jun. 169. S. C. noticed 1 Cooke's B. L. 276. Gregg's Edition.

(n) See Ex parte Hughes, 6 Ves.

622.

(o) Ex parte Coming, 1 Ves. jun. 42.

(p) See ante, 1 Vol. p. 348.

assignees, previous to declaring a dividend; and by the same act, the commissioners are directed to charge assignees with interest at the rate of twenty per cent. for all sums, part of the bankrupt's estate, wilfully retained *or employed by them *528 for their own benefit. Preceding cases therefore on this subject it is not necessary to notice; and by the same statute (g) it is also provided, that the certificate of any assignee becoming bankrupt being indebted to the estate of the bankrupt of which he was an assignee in 100*l.* or upwards, in respect of moneys received by him as assignee, and wilfully retained or employed by him for his own benefit, shall only discharge his person, and his future effects shall remain liable for so much of such debt as shall not be paid by dividends, with lawful interest.

By the same act it is provided, that no action shall be brought for a dividend against the assignees, as might previously have been done; (r) but authority is given to the chancellor, upon petition, to order the assignees to pay the same, with interest. (s)

The assignees, it seems, in consequence of their covenant with the commissioners, are bound to exonerate them from the expense occasioned by an action for false imprisonment brought against them by the bankrupt, in which he was non-suited. (t)

*If a person in whose hands the bankrupt's books are, refuses to produce them before the commissioners, they may commit him. (v) *529

Though the bankrupt has passed his examination, and obtained his certificate, the chancellor has authority to enforce the commissioners' order for the attendance of the bankrupt. (w)

By the 5 Geo. II. c. 30. it is provided, that no *suit in equity* shall be commenced, nor any disputes submitted to arbitration, nor any composition made, by any assignee or assignees, without the consent of the major part, in value, of the creditors of such bankrupt, who shall be present at a meeting of the creditors, pursuant to notice to be given in the *London Gazette* for that pur-

(g) S. 6.

(r) See *Browne v. Bullen*, Dougl. 392. Injunctions, however, have been granted in such cases. See *Assignees of Gardener v. Shannon*, 2 Sch. and Lefr. 228.; but see Mr. Christian's observa-

tions in support of *Browne and Bullen*, 1 vol. Bankrupt Law, p. 316.

(s) S. 12.

(t) *Linthwaite, Ex parte*, 10 Ves. 234.

(v) *Ex parte Keith*, 2 Bro. O. C. 600.

(w) *Anon.* 15 Ves. 449.

poor; and creditors cannot give a general power to assignees to prosecute suits, or submit matters to arbitration, at their own discretion, but there must be a meeting of creditors, upon a notice given in the London Gazette to consider of each particular suit; or cause for arbitration, (x) or composition, (y) and the majority, in value, who are present, bind those who are absent. (z) Assignees may bring actions at law without previously convening the creditors; (a) and it seems that, though assignees cannot file a bill without the consent of the creditors, yet that a creditor may file a bill at the peril of being himself obliged to pay the costs. (b)

*530

If a solicitor carries on suits for an assignee without the authority of the majority in value of the creditors, the estate of the bankrupt is not liable to his bill for such suits. (c)

If a bankrupt be arrested whilst he is *bona fide* on his way to (d) or from (e) his examination, he will on motion and affidavit be discharged, a petition not being necessary; nor is such protection founded only on the act of parliament, (5 Geo. II. c. 30. s. 5.) for he is considered as entitled to it, without the authority of the act. (f) Every mode by which a creditor can arrest a bankrupt for a debt, whether in law or in equity, comes within the protection of the bankrupt act. (g)

The privilege of a bankrupt extends to the case of an arrest upon an attachment for nonpayment of money under an award, made a rule of court, (h) or for nonpayment of money under an order of court; (i) but it has been held that the taking of the bankrupt, by bail, is not a contravention of the act of parliament. (k)

The forty-two days' protection given by the statute to the bankrupt, comprehends the whole of the forty-second day. (l) If

(x) *Ex parte Whitchurch*, 1 Atk. 99.

(y) *Cooper v. Pepys*, 1 Atk. 106. *Warner v. Watkins*, 2 Atk. 7.

(z) *Ib.*

(a) *Cooke's B. L.* 279. edit. 6th.

(b) *Franklyn v. Fenn*, Barn. 30.

(c) *Ex parte Whitchurch and others*, 1 Atk. 210.

(d) *Ogle's Case*, 11 Ves. 556.

(e) *Ex parte Hawkins*, 4 Ves. 661. 3

(f) *Ex parte King*, 7 Ves. 314.

(g) *Ex parte Macwilliams*, 1 Sch. and Lefroy, 175.

(h) *Ex parte Parker*, 3 Ves. 554.

(i) *Ex parte Macwilliams*, 1 Sch. and Lefr. 169.

(k) *Ex parte Gibbons*, 1 Atk. 237.

(l) *Ex parte Donlevy*, 11 Ves. 318.

the commissioners *adjourn the last examination, the bankrupt's protection continues.(m)

Where a bankrupt is ordered to be discharged, the usual way is to direct the creditor forthwith to cause him to be discharged, by which means the sheriff is protected from the venation of an action for an escape.(n)

Where a bankrupt is ordered to be discharged, it is generally with costs.(o)

Assignees under a commission of bankruptcy cannot purchase for their own benefit, either any part of the estate of the bankrupt, or a creditor's right to the dividends;(p) and where the assignee had so purchased the bankrupt's estate, he was, on that ground, removed.(q)

Nor is a commissioner or solicitor under the commission permitted to purchase, either on his own, or another's account.(r)

The assignees must make a dividend after four months, and within twelve, from the issuing of the commission, and give twenty-one days previous notice in the gazette.(s) A second dividend must be made within eighteen months, and such dividend is final, unless there are future effects, in which case a dividend must be made within two months.(t)

*If the dividend is not made at the period pointed out by the *532 act of parliament, (and, owing to the complication of commercial affairs, in great bankruptcies it seldom is,) the commissioners must give notice in the gazette, of a time and place for the assignee or assignees to attend, and show cause why a dividend has not been made; and if no satisfactory reason is given, the commissioners may appoint a time and place when and where they will meet to make such dividend.(u)

The chancellor, it seems, has a discretion for the general benefit of the creditors, and having the right to take order for the distribution of the property, may make such order, as to the time of making of a dividend, as shall appear to him to be for

(m) 1 Cooke's B. Law, 120. ed. 2. 6th.

(n) Ex parte Donkey, 3 Ves. 318.

(o) See lb. 310. Ex parte Wood, 18 Ves.

(p) Vid. Regulations in Bankruptcy, 6 Ves. 5. See ante, 1 vol.

(q) Ex parte Reynolds, 5 Ves. 707.

(r) Ex parte Bonnet, 10 Ves. 381.

See ante, 1 vol. p. 91.

(s) 5 Geo. II. c. 30. s. 32.

(t) lb. s. 37.

(u) Vid. Order 6th March, 1704. 4 Bro. G. C. 546.

the general benefit of the creditors (d) taking care, however, not to interpose delay, unless satisfied that those who apply have a right to call for it, and that finally it will be beneficial to them and the general creditors. (e)

If a creditor has improperly obtained possession of any of the bankrupt's property, his share of the dividend may be retained, unless he gives up such property; (f) but an assignee, it has been held, cannot stop a person's share in a dividend, on account of his own private debt, owing to him from that person. (g)

*533 - Where an assignee dies before he has accounted for what he has received, and leaves no personal assets, the creditors, in respect of his covenant, have a lien upon his real estate. (h)

Where an assignee, under a commission of bankruptcy, died very much indebted by bond, &c. and the creditors of the bankrupt petitioned that the administrator of the assignee might account before the commissioners, he having some of the bankrupt's effects, *in specie*, in his hands, but the administrator denied this upon oath, and swore that there were debts by specialty beyond the assets; the court thought this a proper case for a bill, and not for a summary way of accounting before commissioners.

If all the assignees die, and the heir at law of the survivor is an infant, the chancellor has authority, under the 5 Geo. II. c. 30. s. 31. to order new assignees to be chosen, and a new bargain, and sale, and assignment, the former being vacated, so far as relates to property undisposed of. (i)

If an assignee under a commission of bankruptcy employs an agent to receive money, and he embezzles it, the assignee will be liable to make it good to the creditors, unless he consulted the body of the creditors in the appointment of the agent. (k) But when assignees employ an agent, either from necessity, or

*534 conformably to the common usage of mankind, they have not

(d) *Ex parte Kendall*, 17 Ves. 522. preferable decision, as observed; 1 Christian's Bankrupt Law, 217.
524. S. C. 1 Ross, 71.

(e) 17 Ves. 525.

(h) *Primrose v. Bromley*, 1 Atk. 89.

(f) *Ex parte Smith*, 3 Bro. 46.

(i) *Ex parte Bainbridge*, 6 Ves. 451.

(g) *Ex parte White*, 1 Atk. 90.; but

(k) In the matter of the Earl of Litch-

see contra, *Ex parte Nockold, Cooke's*;

field, &c. 1 Atk. 88.

Bankrupt Law, 1 vol. 545. edit. 6th, a

been held liable, provided they have used due prudence in the choice of the person employed. (l)

The negligence or misconduct of one assignee will not affect a co-assignee. (m)

The court can act in a summary way under a commission of bankruptcy, in transactions between creditors and the assignees; but cannot, on petition, adjust any demands that one assignee may set up against another, concerning a private agreement between themselves, independent of the rest of the creditors. (n)

The court will not permit an assignee to be removed as upon his own consent: he must be removed by the act of the court. (o)

If a person chosen as assignee be permanently resident out of the jurisdiction of the court, as in Scotland, he may be removed. (p) So, if he be insolvent, (q) or becomes bankrupt, in which case the bankrupt and his assignees must join in the assignment to a new assignee. (r) Where an assignee absconds, or from other circumstances he cannot execute an assignment to the new assignee, the chancellor has directed the first assignment to be vacated, and an immediate assignment from the commissioners to such new assignee. (s) *535

An assignee will not be removed merely because he must account, unless there is something in the nature of his interest, rendering it impossible to take the account with due impartiality and justice; or a degree of misconduct in the assignee, making him unfit to execute such a trust. (t)

Certificate.

An agreement in writing by all the bankrupt's creditors to discharge him, would, it has been held, be sufficient, and equal to a certificate. (u)

(l) Ex parte Belchier, Amb. 218.

(g) Vid. Ex parte Greignier, 1 Atk.

(m) See Earl of Litchfield, &c. 1 Atk. 91.

89. Primrose v. Bromley, 1 Atk. 89.

(r) Ex parte Newton, 1 Atk. 97.

(n) In the matter of the Earl of Litchfield, 1 Atk. 88.

(s) Ex parte Leman, 13 Ves. 271.; see Ex parte Higgins, 1 Ball and Bea.

(o) Vid. Regulations in Bankruptcy, 6 Ves. 4.

(t) Ex parte Surtees, 12 Ves. 44.

(p) Ex parte Grey, 13 Ves. 274.

(u) Troughton and Gittcy, Amb. 633.

In order to give effect to the certificate, the consent of a proportion of the *creditors* must be first obtained, and then the consent of the *commissioners*, and, lastly, the consent of the *clerk*.

And first, with respect to the *signature of the creditors*. Unless a person proves a debt, or shows a reasonable ground for a claim, he cannot sign the certificate. (u) It is necessary that *three fifths* (v) of the creditors, in number and value, whose debts amount to twenty pounds, should sign. If there is a fraction, one for that fraction must sign; (w) the signature of the creditors is a *voluntary act, and uncontrollable. (x) : Applications have been made to parliament to renew the provisions of an act that formerly existed, vesting in the lord chancellor the power to give the bankrupt his certificate where the creditors had refused their consent; but upon great and repeated consideration, the conclusion was, that such a discretion should not be intrusted to the great seal. (y)

*536

Precipitancy in the signing of certificates is discouraged (z) and it seems doubtful, whether a signature, previous to the last examination, is effectual; (a) though this may operate harshly upon the bankrupt; for, when a final dividend is made, the commissioners may divide the whole, and are not bound to make any reservation, in respect of the bankrupt's allowance, unless he has obtained his certificate. (b)

In pursuance of a general order, (c) the creditors, when they sign a certificate, must, at the same time, write opposite their names the day of the month and year on which they so sign the same; and their signature must be attested in writing upon the certificate by the solicitor to the commission, or some clerk of the solicitor, or by the messenger to the commission, or *by some clerk of the commissioners; and in all affidavits exhibited to the commissioners, in order to prove the signature and sa-

*537

(u) 1 Atk. 83.

(v) 49 Geo. III. c. 121. s. 13.

(w) 1 Christ. Bank. Law, 154.

(x) *Robson v. Calze*, Dougl. 216. Ex parte King, 7 East, 92. Ex parte King, 10 Ves. 417. 13 Ves. 181. Ex parte Bangley, 17 Ves. 118.

(y) 17 Ves. 118.

(z) Anon. 1 Atk. 84.

(a) Ex parte King, 11 Ves. 424. s. and see Anon. 1 Atk. 84.

(b) *Groome v. Petta*, 6 T. R. 548. As to the allowance, see post.

(c) See Lord Eldon's Order, 8th August, 1809, 16 Ves. 312.

prescription of the consent of the creditors to the commissioners' signing and sealing the certificate of the bankrupt, the day of the month and year in which the respective creditors signed and subscribed such consent must be distinctly stated. To prevent frauds on the commissioners, a list is to be made and kept by them, or one of them, of all creditors above twenty pounds, who prove their debts, and of the amount of their respective debts, which list, as the same shall, from time to time, be made up, is to be signed by three of the commissioners.

Creditors may, by a special power of attorney for that purpose, (a general power is insufficient,) authorise a third person to sign the certificate. (d).

A creditor who proves different debts in different rights, can only sign once: as if he proves a debt due to himself, and also proves a debt as an executor, a trustee, or guardian. (e).

Where there are several executors, one executor may sign the certificate; but, it seems, a trustee cannot, or rather ought not to sign, without the consent of his *cestui que trust*; and where the *cestui que trust* is an infant, and therefore cannot consent, it is a hazardous step. (f).

A bankrupt's certificate does not require a stamp until it has been allowed, and therefore an alteration in it, after it had been stamped, and before allowance, was not considered as an available objection. *538

One partner may, on behalf of himself and his other partners, sign the certificate, or authorize a third person, by a power of attorney, to sign the same; (g) and though the partnership is dissolved, yet the signature of one partner is binding. (h)

With respect to the signature of the commissioners, it has been held, that they have a judicial discretion given to them by act of parliament; and no court of justice has power to compel them to certify, (i) that the bankrupt has in all things conformed him-

(d) See *Ex parte Mitchell*, 14 Ves. 598. *Ex parte Baugley*, 17 Ves. 118. In a case of manifest oppression, parliament would, probably, relieve. In *Ex parte*

(e) *Ex parte Saumarez*, 1 Atk. 84.

(f) *Powell v. Evans*, 5 Vet. 838.

(g) *Ex parte Mitchell*, 14 Ves. 597.

(h) *Ex parte Hall*, 17 Ves. 82.

(i) *Ex parte Williamson*, 1 Atk. 82. *Ex parte King*, 15 Ves. 128.; and see

Williamson, Lord Hardwicke seems to have doubted whether a mandamus would lie; but it has been determined it will not, 7 East, 92.

self according to the directions of the act, and that there does not appear to them any reason to doubt of the truth of his discovery, or that it is a full discovery, as they must do, before the person or persons holding the great seal can enter into any discussion on the subject.(k) But though certificates are matters of judgment, yet it ought not to be arbitrary either in the commissioners or the chancellor, to say, "we will or will not allow
 *539 a certificate;" but they ought to be governed "entirely by fairness or fraudulent conduct in the bankrupt.(l)

The commissioners have no duty but to see that the bankrupt has conformed to the statutes; and that duty is confined to his conduct *since he became bankrupt.(m)*

After the creditors and commissioners have signed the certificate, it is laid before the *chancellor, for his allowance*, and he, formerly, referred it to the judges.(n) The chancellor, in his discretion, may either allow the certificate; or send it back to the commissioners; and for the purpose, among others, of permitting other creditors, who, living at a distance, might not have had an opportunity to prove, and express their assent or dissent to the certificate. When the certificate is so sent back, the commissioners are not confined to that object, nor bound by their original certificate; but upon the whole it is open to their discretion, whether or not they will again certify, which, as before observed, they must do before the bankrupt can complete his certificate.(o) But it seems that the chancellor cannot require the commissioners to review their certificate as to that part which relates to the point whether the *discovery is full* or not;(p) but if the chancellor is dissatisfied on that subject, he will, it seems, examine the bankrupt *visa voce*.(q)

*540 *A certificate allowed in the lifetime of the bankrupt, though not confirmed by the lord chancellor till after the bankrupt's death, has been determined by Lord Hardwick to be good, and that the operative force of it arises from the consent of the creditors, and when so confirmed it has its effect from the begin-

(k) Ex parte Bangley, 17 Ves. 118.

(l) Ex parte Williamson, 1 Atk. 82.

(m) Ex parte Gardener, 18 Ves. 45.

48.

(n) 1 Atk. 87.

(o) 16 Ves. 183.

(p) Ex parte Bangley, 17 Ves. 119.

(q) Ex parte Bangley, 17 Ves. 118.

ning; (i) but this latter proposition seems to be erroneous, and in subsequent cases it has been clearly held, that property coming to the bankrupt after the signature of the certificate by the creditors and the commissioners, but before the allowance of the same by the chancellor, belongs to the creditors; (k) so that the operation of the certificate is clearly from the allowance of the same.

After the signature of the creditors and commissioners, the certificate is left in the bankrupt's office, for three weeks, together with an affidavit of the bankrupt that he obtained his certificate without fraud, and notice of the same is given in the gazette; before the chancellor acts upon it, a period adopted to enable creditors to oppose it, if they have grounds for so doing.

A petition to stay a certificate, in order to give a creditor an opportunity of proving his debt, will not avail, unless he accounts for not having applied before. (l)

Nor will a bankrupt's certificate be stayed, in order that an account may be taken of what is due to the petitioner; (m) or to give a person insisting on a right to stop in transitu an opportunity of proving, in case he should fail in his action. (n)

If creditors live abroad, and the certificate is signed before they have had time to prove, it is a good ground for a petition to stay the certificate. (o)

The certificate of a bankrupt having been stayed upon the petition of a claimant under the commission, who suggested fraud and collusion between the bankrupt and his son, there was a meeting of the commissioners to examine into the matter, and at this meeting several new creditors came in and proved; but as they did not join in a petition to set aside the commission as fraudulently obtained, the court would not delay the allowance thereof, but left the claimant to file a bill if he thought proper. (p)

By a general order, affidavits to be made use of at the hearing of any petition to stay a bankrupt's certificate, must be

(i) Bromley v. Goodere, 1 Atk. 77.

(k) Tudway v. Bourne, 2 Burr. 716.
Webb v. Ward, 7 T. R. 296. See these cases cited with approbation, 1 Christian's Bankrupt Law, 156.

(l) Ex parte Adams, 2 Bro. C. C. 48.

(m) Ex parte Johnson, 1 Atk. 81.

(n) Ex parte Heath, 6 Ves. 613.

(o) Ex parte Saumarez, 1 Atk. 84.

(p) Ex parte Fydell, 1 Atk. 73.

brought into the office, together with the petition, except such affidavits as are necessary to be made in reply to any affidavits made in answer to such petition.(y)

And it is a rule, that where a petition to stay a certificate fails,
 *542 the petitioner pays the costs; *unless, in the transaction, there is some misconduct on the part of the bankrupt.(r)

A certificate is void, if the bankrupt does not disclose a false proof of debt.(s)

The clause in the 5 Geo. II.(t) in which a bankrupt is excepted from the benefit of the act, who hath upon the marriage of any of his children given above the value of 100*l.* unless he hath at the time sufficient to satisfy all his creditors, being a penal clause, is construed *strictly*, and has been held not to apply as to money given to a *niece*.(u)

The same statute also provides, that where a man loses 5*l.* in gaming, in the course of the day, his certificate shall be void; and if this appears clear to the chancellor, he will not grant a certificate; but if there be contradictory affidavits, and the fact cannot be ascertained, the chancellor will grant the certificate, and the creditor will be left to avoid it, if he can, at law, or to indict for perjury.(v)

Insuring in the lottery has been holden not to be "a pastime or game" within the statute.(w)

Any creditor, though his debt be under 20*l.* will be heard against the allowance of a certificate, by showing fraud or other ground;(x) and creditors who have signed the certificate, if, since the signing of it, they have gained a knowledge of its being unfairly obtained, may oppose it.(y)

*543 *After a certificate is allowed, a person not a creditor under the commission cannot present a petition with a view to obtain discoveries to defeat the certificate; but should file a bill of discovery: a petition, therefore, for a general inspection of a

(g) Vid. Order, 16th Nov. 1805, 11 Ves. 542. Ex parte the Royal Bank of Scotland, 18 Ves. 5.

(r) 18 Ves. 7.

(s) 24 Geo. II. cap. 57. s. 9.; and see 3 Esp. N. P. 264.

(t) See Ch. 30. s. 12.

(u) Ex parte John De Saumarez, 1 Atk. 86.

(v) Ex parte Kennett, 1 Ves. and Ves. 194.

(w) Lewis v. Piercy, 1 H. Black. 29.

(x) Ex parte Allen, 17 Vin. 134. cited 1 Christian's B. L. 154.

(y) Tudway v. Bourne, 2 Burr. 716.

bankrupt's books, for the purpose of getting rid of the certificate, by proving gambling transactions, was refused.(y)

It is very hard, but it is settled, that if a friend or foe of the bankrupt gives money, as an inducement to sign the certificate, though the bankrupt was in no degree privy to the transaction, and would never have consented to it, the certificate is void:(z) but if the creditors know that money is given to sign the certificate, it seems it is not avoided.(a)

If a creditor agrees privately with the bankrupt to sign his certificate, upon his promise or contract to pay the creditor's whole debt, such contract is void by the statute; (5 Geo. II. c. 30. s. 11. ;)(b) and money paid to a creditor to induce him to sign a certificate, may be recovered back.(c)

The effect of the certificate is to discharge the bankrupt from all debts, whether joint or separate, legal or equitable, which might have been proved under the commission;(d) and from some debts which could not have been proved; as where an action is brought against a bankrupt in respect of a debt proveable under the commission, and a verdict is obtained after the commission, the costs of such action, though not proveable under the commission, are barred by the certificate.(e) *544

A certificate under a second commission does not protect the future effects of the bankrupt, unless he pays fifteen shillings in the pound under such commission; and the law is the same though the first commission was superseded;(f) and by the 49 Geo. III. c. 121. s. 6. if assignees become bankrupt, having 100l. of the bankrupt's estate in their hands, their future effects are liable to the payment of the same.

By the 5 Geo. II. c. 30. s. 7. if a bankrupt, after he has obtained his certificate, is arrested for any debt due before he be-

(y) Ex parte Mawson, 6 Ves. 614.; see Ex parte Fydell, 1 Atk. 73.

(z) Ex parte Butt, 10 Ves. 359. and Ex parte Hall, 17 Ves. 62.

(a) Ex parte Butt, M. 8.

(b) Sparret v. Spiller, 1 Atk. 105. The case of Lewis v. Chase, 1 P. Wms. 620. has not been followed. See Sumner v. Brady, 1 H. Black. 847.

(c) Ex parte Sadler, 15 Ves. 52. Fieze v. Randall, 6 T. R. 146.

(d) Horsey's case, 3 P. Wms. 24.

(e) See Ex parte Hill, 11 Ves. 648. and Ex parte Charles, 16 Ves. 256. 3. C. 14 East, 197.

(f) Thornton v. Dallas, Dougl. 46. Everett v. Backhouse, 10 Ves. 94. Ex parte Leaverland, 1 Atk. 145. cit. 1 Christian's B. L. 146.

came bankrupt, he will be discharged upon common bail, and may plead his bankruptcy, and a verdict will pass for the defendant, unless the plaintiff proves the certificate was obtained unfairly or by fraud, or any concealment to the value of 10*l.*; and if a verdict passes for the defendant, or the plaintiff shall be nonsuited, or judgment given against him, the defendant will recover his full costs.

It has been held, however, that if there is any appearance of fraud on the part of the bankrupt, or it appears that the certificate is seriously meant **to be disputed*, the court will not interfere in a summary way. *(g)*

By section 13 of the same act, it is provided, that if any bankrupt who shall have obtained his or her certificate shall be taken in execution, or detained in prison on account of *any debts due or owing before he or she became bankrupt*, by reason that judgment was obtained before such certificate was allowed and confirmed; it shall and may be lawful for any one or more of the judges of the court wherein judgment has been so obtained against such bankrupt, on production of his certificate, to order his discharge.

It may be doubted whether this act authorizes a discharge from actions or executions in respect of debts rendered proveable, notwithstanding a prior act of bankruptcy, by the 45 Geo. III. c. 135. and the 49 Geo. III. c. 121. there being no provision to that effect in those statutes, and not being debts owing *before the party became bankrupt*, as required by the 5 Geo. II. c. 30. s. 7. and 18.

The crown is not bound by a certificate. *(h)*

Where there is a joint certificate, if one partner dies before the allowance, the certificate is good as to the survivor. *(i)*

A certificate does not bar contingent debts, where the contingency upon which the debt was **payable* did not happen in time to enable the party to prove his debt. *(k)*

Formerly, if there was a bond to secure an annuity, and also a covenant, though the bond was forfeited before the bankruptcy, and therefore, the certificate was a bar to that, it did not bar

(g) 1. Cooke's Bankrupt Law, 638.
Edit. 6. and the authorities there cited.

(h) Anon. 1 Atk. 202.

(i) Ex parte Cume, 10 Ves. 51.

(k) 1 Atk. 110, 120.

the action for breaches of covenant subsequent to the bankruptcy ;(l) but now, by the 49 Geo. III. c. 121. s. 17. creditors are admitted to prove the value of the annuity, and the bankrupt is discharged by his certificate from all future claims. So, by the same statute, sect. 19. bankrupts who deliver up leases, or agreements for leases, to the assignees, are exempted from all future liability in respect of rent and covenants.

A cognovit is not discharged by bankruptcy and a certificate.(m)

So, where an action arises *ex delicto* before the bankruptcy, the party is not obliged to go before the commissioners to receive a satisfaction, but may bring an action, to which the bankrupt's certificate is not a bar.(n)

The allowance of a bankrupt's certificate does not discharge his sureties.(o)

Where a person discharged by the insolvent debtor's act becomes a bankrupt afterwards, his certificate must be special, and will be allowed *only as a discharge of his person, but not of *547 his future estate and effects.(p)

Bankrupt's Allowance.

By the 5 Geo. II. c. 30. s. 7. it is enacted, that if the creditors are paid a dividend of ten shillings in the pound, the bankrupt shall be allowed 5 per cent. out of the net produce of his estate, so as the same does not exceed 200l.; if the estate pays twelve shillings and sixpence in the pound, he is allowed seven and a half per cent. so as the same does not exceed 250l.; and if the estate pays fifteen shillings in the pound, he is allowed ten per cent. so as the same does not exceed 300l.

A bankrupt is not entitled to his *allowance* until a *final dividend* is made,(q) nor then, unless he has obtained his certificate.(r) The allowance is a *vested* interest, and passes to the

(l) *Ex parte Granger*, 10 Ves. 351.

(m) *Wybourne v. Ross*, 2 Taunt. 68.

(n) *Hammond v. Toulmin*, 7 T. R.

812.

(o) *Ex parte Whitman*, 1 Atk. 84.

(p) *Ex parte Green*, 1 Atk. 257.

(q) *Ex parte Stiles, &c.* 1 Atk. 308.

but see Mr. Christian's observations on that case, 1 Bankrupt Law, p. 137.

(r) *Ex parte Grier*, 1 Atk. 207.

Greene v. Potts, 6 T. R. 548.

bankrupt's representatives;(s) and though an allowance has been improperly ordered, the bankrupt is not bound to refund.(t)

Where partners are bankrupts, and pay different proportions towards the debts, they have but one allowance, which is divided between them in the proportions their respective estates have paid.(u)

*548 *Upon a *second bankruptcy* no allowance is made to the bankrupt, if the estate does not pay fifteen shillings in the pound.(v)

The allowance is preferred before interest to the creditors on their debts, which is paid only in the event of a surplus.(w)

Surplus.

Under a commission, all debts which carry interest have the same computed on them only to the date of the commission; but it has repeatedly been held, though it is difficult, Lord *Eden* observes, to say on what ground the first decision proceeded,(x) that if there be a *surplus* after the payment to the creditors of 20s. in the pound, the creditors are entitled to interest upon such debts as, either upon the face of the security,(y) or by force of the contract, carry interest,(z) though such interest had not accrued at the time of the bankruptcy, nor for many years afterwards;(a) but such as are creditors by bond, are not to have interest beyond their penalties.(b) The bankrupt is entitled to the remainder, after payment of the interest; and pending the commission he has a right to an inspection of the

*549 proceedings;(c) and *upon a petition specifying palpable errors in the accounts settled by the commissioners, they will be rectified.(d) The bankrupt also, if he has reason to complain of ne-

(s) *Ex parte Trap*, 1 Atk. 208. *Ex parte Calcot*, 1 Atk. 209. S. C. 3 Atk. 814.

(t) *Russell v. Russell*, 1 Bro. 269.

(u) *Ex parte Bate*, 1 Bro. C. C. 452; but see Mr. Christian's remarks on this case, 1 Bankrupt Law, 189.

(v) *Ex parte Gregg*, 6 Ves. 238.

(w) *Ex parte Morris*, 3 Bro. C. C. 79.

(x) *Ex parte Koch*, 1 Ves. and Bea. p. 345.

(y) *Ex parte Morris*, 1 Ves. jun. 132. S. C. 3 Bro. C. C. 79.; and see *Ex parte Mills*, 2 Ves. jun. 303., and *Ex parte Reeve*, 9 Ves. 590.

(z) *Ex parte Champion*, 3 Bro. C. C. 436. *Ex parte Haakey*, ib. p. 504.; see also *Ex parte Mills*, 2 Ves. 302.

(a) *Butcher v. Churchill*, 14 Ves. 573.

(b) *Bromley v. Goodare*, 1 Atk. 75.

(c) *Two good v. Swanston*, 6 Ves. 483.

(d) *Ib.* See 15 Ves. 8.

glect in his assignees to get in his estate, may treat them as trustees of the surplus, and compel them by a suit in equity to get in all they can for his benefit.(e) Interest out of a surplus in bankruptcy will be given to judgment creditors, from the date of the commission to the time when the principal sums were paid; notwithstanding the securities were at the time delivered up to the assignees with receipts in full endorsed on them; the creditors apprehending the estates would not produce a surplus, which proved to be a mistake.(f)

Charitable Uses.

By the statute of the 43 Eliz. c. 4. authority is given to the chancellor or *lord-keeper*, and to the chancellor of the *duchy of Lancaster*, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by their decree, which may be reviewed in the respective courts of the several chancellors, upon exceptions taken thereto; and an appeal lies from them to the house of lords.(a) It was much debated whether a bill of review would lie after an appeal to the chancellor; but the judges determined it would not.(b) *550

By the 52 Geo. III. c. 101 s. 12. in cases of breach of trusts created for charitable purposes, a petition, signed and allowed by the attorney general, may be presented to the chancellor, who is to hear the same in a summary way, and make order thereon.(c)

The facility thus given for remedying such breaches of trusts, will contribute much to supersede all applications for commissions under the great seal, to inquire into abuses of charitable

(c) *Ex parte Donovan*, 15 Ves. 8.; these cases lies to the house of lords, but see what is said in *Spragg v. Binkes*, 5 Ves. 587. which seems adopted by Mr. Wooddeson, vid. 1 Wooddeson's Lect. 237. is certainly incorrect.

(f) *Ex parte Decy*, 2 Ball and Beatty, 77.

(a) See 3 Black. Com. 427. See *Warner v. Wm. North*, Sho. Parl. Cas. 110. *Duke's Charitable Uses*, p. 62. edition 1876. The opinion in *Saul v. Wilson*, 2 Vern. 118. that no appeal in

(b) See *Windsor v. Hilton*, Cro. Car. 40. S. C. *Wm. Jones*, 147.; and see case of *Pridgeon*, Cro. Car. 351.

(c) See a case determined under this jurisdiction, *Ex parte Berkhamstead Free School*, 2 Ves. and Bea. 134.

donations, which, indeed, even before this act, were but seldom resorted to.

The founder of a charity may give a limited visitatorial power, and, where that is the case, a commission of charitable uses may, notwithstanding, be issued. As where the founder, by his statutes, gave the ordinary of the place a power to interpret and determine doubts upon the statutes, and other powers; and to the dean of York a power in certain cases, but no visitatorial power was given as to the administration of the landed property, it was held that a commission of charitable uses might issue. (d)

*551 It seems, too, that where governors or visitors *are themselves trustees, or are making a fraudulent use of such powers as they have as visitors or governors, a commission may be issued, although in such case the chancellor has a jurisdiction over the subject, by way of *information*. (e)

If the heir of the founder, visitor of a charity, becomes a lunatic, the chancellor, on petition, acts as visitor. (f)

If a commission be unduly issued, a motion may, it seems, be made to quash the commission. (g) If the chancellor is doubtful whether he has authority under the act to issue a commission, he may direct a case for the opinion of a court of common law, but such opinion is not binding upon him. (h)

After a decree by the commissioners, exceptions to the same may be taken before the chancellor; and even in that stage of the proceedings, it may, it seems, be urged as ground of exception, that the commission was invalid, and the commissioners without authority to make such a decree. (i)

Notwithstanding a decree under a commission of charitable uses, the court of chancery may still permit a suit to be instituted, in which neither side is bound by what appeared before the commissioners, but may set forth new matter. (l)

*552 *Charitable legacies have before been considered. (m)

(d) *Kirkby v. Ravensworth Hospital*, 15 Ves. 305.

(e) *Ib.* p. 314. *Vid. ante*, p. 129, etc.

(f) *Attorney General v. Dixie*, 13 Ves. 519.

(g) *Kirkby v. Ravensworth Hospital*, 15 Ves. 308.

(h) *See Ib.* p. 313.

(i) *See Kirkby v. Ravensworth Hospital*, 15 Ves. p. 308.

(l) *Corporation of Bedford v. Leathall*, 2 Atk. 552.

(m) *Ante*, p. 49.

City of London Tithes.

In the year 1670, an act passed, "for the better settlement of the maintenance of the parsons, vicars, and curates, in the parishes of the city of London, burnt by the fire."⁽ⁿ⁾

By this act it is provided, "that in case the lord mayor, or court of aldermen, shall refuse to execute any of the respective powers to them by this act granted, or to perform all and every such thing relating either to the assessing or levying of the respective sums in the act mentioned, that then it shall and may be lawful for the *lord chancellor* or *lord keeper* of the great seal, for the time being, or any two or more of the barons of his majesty's court of exchequer, by warrant under his or their respective seals, to do and perform what the said lord mayor and court of aldermen, according to the true intent and meaning of this act might or ought to have done, and by such warrant either to empower any person to make the respective assessments, or to authorize the respective officers appointed to collect the sums aforesaid, to levy the same by distress and sale of the goods of any person that shall refuse to pay the same in manner and form aforesaid."

Some cases relative to this act were determined by Lord *Harcourt* ;^(o) and in a case upon the act, it was held by Lord *Hardwicke*, that it does not extend *to every case under the act, *553 but only where there has been a *refusal* by the *lord mayor*, &c. to execute the powers granted to them ; and he held in the case before him, that the court had jurisdiction to inquire whether the *lord mayor* had done right in refusing his warrant, to levy sums assessed on the inhabitants, and if of opinion he had done wrong, to issue his warrant, for levying the sums assessed ; and his lordship gave directions accordingly.^(p) His lordship also held, "that in case of any variance or difference in the assessment between the minister and the parishioners, and appeal to the *lord mayor*, the court of chancery or exchequer have no jurisdiction, unless the *lord mayor* refuses to take cognizance ; because that would be refusing to execute their own power : but

(n) 22 and 23 Car. II. c. 15. s. 12.

(o) Cited 3 Atk. 638.

(p) 3 Atk. 639. Gwillim's Tithes Cases, p. 811.

if they have entered into the consideration of the grievance in any manner, their appeal would be final."(q)

After a determination by the chancellor under this act no bill of review lies.(r)

Habeas Corpus Act.

By the celebrated *habeas corpus* act,(s) an authority is conferred upon the chancellor. By this act he is enabled to issue an *habeas corpus* to bring up persons committed to prison; and, if bailable, is enabled to discharge the party upon giving security to appear and answer to the accusation in the proper court of judicature.

*554

**Arbitration.*

The stat. of 9 and 10 W. III. cap. 15. s. 1. enacts, that all merchants and others desiring to end any controversy (for which there is no remedy but by personal action, or suit in equity) by arbitration, may agree that their submission of the suit to the award or umpirage of any persons shall be made a rule of any of his majesty's courts of record which the parties shall choose, and may insert such their agreement in their submission, on the condition of the bond or promise: and upon producing an affidavit of such agreement, and upon reading and filing such affidavit in the court so chosen, the same may be entered of record in such court, and a rule of court shall be thereupon made that the parties shall submit to, and finally be concluded by, such arbitration or umpirage; and in case of disobedience thereto, the party neglecting or refusing shall be subject to all the penalties of contemning a rule of court, and process shall issue accordingly, which shall not be stopped or delayed by any order, &c. of any other court, either of law or equity, unless it appears on oath that the arbitrators or umpire *misbehaved themselves*, and that *such award was corruptly or unduly obtained*.

By sect. 2. any arbitration or umpirage procured by corruption or undue means shall be void, and set aside by any court

(q) *Ib.*

(s) 31 Chas. II. chap. 2.

(r) See Case of Pridgeon, Cro. Car.

of law or equity, so as such corruption or undue practice be complained of in the court where the rule is made for such arbitration, before the last day of the next term *after such arbitration made and published to the parties. *555

Awards made in causes depending, are not awards to which the statute relates.(t)

A motion may be made to the chancellor to make a submission to an award a rule of court; and this as well after the award is made as before.(u)

When an award is to be made a rule of court, the submission that it shall be so must be in writing.(v)

The jurisdiction of a court of equity is not, it seems, barred, merely by a reference under the statute;(w) and for that reason, it seems, it is always part of the rule at nisi prius, that the parties shall bring no bill in equity, either against the arbitrators or each other.(x)

Where, on a bill filed, the parties agree to refer the accounts to arbitrators, who are to take them in the same manner as before the master, with a provision that the award shall be final between the parties, the award must be confirmed, as is done upon a master's report, and exceptions will lie to such an award,(y) in regard to *matters on the face of it, but not as to *556 matters de hors the award.(z)

It has been held, that courts of equity, where an award has been made under a submission, pursuant to the statute, are not confined to allow of exceptions to awards within the time prescribed by the statute, as courts of law are;(a) but that doctrine has been doubted.(b)

(t) See Lucas v. Wilson, 2 Burr. 701. lie, 14 Ves. 270. ; and see Street v. Rig- and Lord Lonsdale v. Littledale, 2 by, 6 Ves. 818. ; but see — v. Mills, Ves. jun. 453. Sed Vid. 2 Ves. jun. 23. 17 Ves. 419:

(u) Chicote v. Lequeane, 2 Ves. 315. Pownal v. King, 6 Ves. 10. contradicting Spettigue v. Carpenter, 3 P. Wms. 361.

(v) — v. Mills, 17 Ves. 421.

(w) See on this point, Ward and Periam, Vin. Abr. Tit. Arbitrament, (H. a.) Ca. 18.

(x) Lord Lonsdale v. Littledale, 2 Ves. jun. 453. ; and see Nicholls v. Cha-

(y) See Crossly v. Carrington, 1 Vern. 469. ; and see 2 Vern. 109. ; but see Price against Williams, 3 Bro. C. C. 163. ; and Woodbridge against Hilton, 1 Bro. C. C. 396.

(z) Dick against Milligan, 4 Bro. C. C. 117. 536:

(a) Alarides and Cambel, Barn. 152.

(b) Godfrey v. Boucher, Vin. Abr. Tit. Arbitrament, (J. a.) Cas. 39.

The only grounds for setting aside an award, are, first, that the arbitrators have awarded what was out of their power; something, for instance, contrary to law; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption: as if they will not hear a witness; thirdly, that they have proceeded upon a mere mistake, *(c)* which they themselves admit; *(d)* otherwise, though the mistake be palpable, the court cannot on motion relieve; but, perhaps, the court would not enforce an award by attachment, in case of an evident mistake. *(e)*

Where an arbitrator received evidence, after notice to the parties that he would receive no more, in which they acquiesced, the award was set aside, though the arbitrator swore that it *557 had no weight with him. *(f)* If arbitrators give reasonable notice to persons to attend, and they do not, they may proceed without them. *(g)*

Arbitrators are considered as acting corruptly where they act as agents; and also where they take instructions, or talk with one party in the absence of the other. *(a)*

An award will not be set aside because an arbitrator has used the judgment of another person. *(b)*

If an award be made a rule of court, and an *attachment* is taken out for not performing the award, the attachment is gone by the death of the party, and the remedy, it has been held, is lost. *(c)*

Jews.

By the act 1 Anne, st. 1. c. 30. it is provided, that if any Jewish parent, in order to compel his or her protestant child to change his or her religion, shall refuse to allow such child a fitting maintenance suitable to the degree and ability of the parent,

(c) Price against Williams, 3 Bro. C. C. 164.

(d) Morgan v. Mather, 2 Ves. jun. 18. See Emery v. Wase, 5 Ves. 848.

(e) Morgan v. Mather, on rehearing, 2 Ves. jun. p. 22.

(f) Walker v. Frobisher, 6 Ves. 70.

(g) Featherstone v. Cooper, 9 Ves. 68. Waller and King, 2 Mod. 63.

(a) Featherstone v. Cooper, 9 Ves. 69.

(b) Emery v. Wase, 5 Ves. 848.

(c) Webster and Bishop, 2 Vern. 444. S. C. Pre. in Ch. 233.; and see 2 Eq. Abr. 93. Ca. 6.

and to the age and education of such child, then, upon complaint to the lord chancellor or lord keeper, &c. it shall be lawful for the lord chancellor, &c. to make such order for the maintenance of such protestant child as he or they shall think fit.

*Upon this act it has been determined, with regard to the *558 court's allowance of maintenance out of a Jew's estate, to a daughter, turned protestant, that it is not material, though the daughter be above forty years of age, or married, or though the Jew be dead.(d)

Infant Trustee.(e)

By the 7 Ann. c. 19. infant trustees or mortgagees are, upon petition,(f) enabled to convey, under the direction of the court of chancery or exchequer, the estates they hold in trust or mortgage, to such person or persons as either of those courts shall direct.

Until the passing of this act, if the real estate chanced to descend, or came to an infant, the mortgagor could not have his estate again until such infant attained twenty-one; but the act extends only to plain and express trusts, and not to such as are implied or constructive only;(g) nor will an infant, in general, be ordered to convey, without suit, if he has an interest, or there be a doubt on the subject.(h) The infant, however, being not only heir, but entitled as one of the next kin,(i) or as co-executor and co-residuary legatee,(k) to a share of the mortgage *money, has been held not to be such an interest as *559 prevents the application of the statute.

If, on a reference to the master under this statute, the master reports that the infant is not a trustee, &c. within the statute, no exception can be taken to his report, but the party disap-

(d) Vincent v. Fernandez, 1 P. Wms. 524.

(f) See 8 Ves. 96.

(g) Goodwyn v. Lister, 3 P. Wms.

(e) What is here said under this head, being an enlargement by statute of the equity jurisdiction of the chancellor over trustees, ought properly to have been before observed upon under the head of Trusts; but as it was omitted, it is here introduced.

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(h) Hawkins v. Obeen, 2 Ves. 559, etc.

(i) Ex parte Carter, 2 Dick. 609.

(k) ——— v. Hancock, 17 Ves. 383.

proving of the report, must bring it on by petition, stating the report, (l)

Where the vendor of an estate died before the contract entered into by him for the sale was completed, his heir at law, an infant, was declared to be a trustee within the statute, and was directed to convey, (m)

An infant, the surviving life in a bishop's lease, not beneficially interested, has been held to be an infant trustee, within the statute, (n)

In one case Lord *Hardwicke* admitted an infant trustee might levy a fine under this statute, but it was doubtful whether he could suffer a recovery without a privy seal; (o) but in a subsequent case he held, that an infant, to whom a trust estate is devised in tail, may be ordered to convey by recovery, pursuant to the statute, (p)

An order under this act must be obtained by petition, and not on motion, (q)

*560 The words of the act are general, and therefore *apply to estates in *Ireland*, (r) and in the *East and West Indies*, (s)

No order will be made on an infant to convey, where the trust does not appear in writing; but, in such case, the *cestui que trust* must file a bill, (t)

An infant trustee is never ordered under this act to convey to another trustee, upon trusts to be executed. That can only be effected by a bill praying to have a new trustee appointed, and a conveyance, (u)

Upon a petition for an infant trustee to convey, under the statute, the order, it seems, should be upon the infant to convey, the other party undertaking to pay such costs as shall appear to be reasonably incurred, (v)

Where an infant conveys as a trustee within the statute, not

(l) *Ex parte Burton*, 1 Dick. 385.

(m) *Smith v. Hibbard*, 2 Dick. 730.

(n) *Ex parte Hodgson*, 2 Dick. 737.

(o) *Ex parte Bowes*, 3 Atk. 164. That a fine may be levied, see *Ex parte Maire*, 3 Atk. 479.

(p) *Ex parte Johnson*, 3 Atk. 556.; and see *Ex parte Smith*, Amb. 624.; and see 5 Ves. 240, 243.

(q) *Evelyn v. Foster*, 8 Ves. 96.

(r) *Ibid*.

(s) *Ex parte Anderson*, 5 Ves. 240.

Ex parte Prosser, 2 Bro. C. C. 325. *Ex parte Tenniliteau*, 2 Dick. 569.

(t) *Ex parte Vernon*, 2 P. Wms. 542.

(u) *Ex parte Anderson*, 5 Ves. 243.; and see *Rigg and Sykes*, 1 Dick. 490.

(v) *Ex parte Cant*, 10 Ves. 554.

being so, he will not be bound by his conveyance under such an order; yet, if it is a case in which he would be bound to convey, when of age, his conveyance being voidable only during his infancy, and until avoided passing the legal estate, and no one having a right to elect for him, whether it should be void or not, he would, when he became adult, be placed in such a situation, that if he sought at law to avoid his deed, a court of equity would prevent him. (w)

*The infant is entitled to his necessary costs on these occasions. (x) *561

Marriage Act.

By the 26 Geo. II. c. 33. marriages by license, where either party, not a widow or widower, is under twenty-one, are rendered null and void, without the consent of the father or guardian, or of the mother, if living and unmarried, in case there is no father or guardian previously had and obtained; and if the father, or guardian, or mother, be non compos, abroad, or refuse to consent, the party may apply to the lord chancellor, who, if he approve of the marriage, may declare his approbation accordingly; after which, the solemnization of the marriage will be legal.

Friendly Society Act.

A jurisdiction is given by the statute, 33 Geo. III. c. 54. to proceed in a summary way, in regard to these societies.

The preference given to friendly societies over other creditors, (y) is confined to debts in respect of money received by officers of these societies, by virtue of their offices, and independent of contract; and therefore if these societies, instead of resting upon the security which the legislature gives them, lend money to one of their officers, (z) or *to any other persons, (a) upon *562 a special contract between him and them; as, for instance, a promissory note; that is a loan, and is not considered as mo-

(w) — v. Hancock, 17 Ves. 384.

(x) Ex parte Cant, 10 Ves. 554.

(y) See section 10 of the act.

(z) Vide Stamford Friendly Society, 15 Ves. p. 280.; and see Ex parte "The

Amicable Society of Lancaster," 6 Ves. 98.

(a) Vid. Ex parte Ashley and Ex parte Corser, 6 Ves. 441.; and see Ex parte Ross, lb. p. 802.

ney in such person's hands, within the protection of the act of parliament.

But, if money be in a treasurer's hands, and apprehensions are entertained of it, and the money is demanded, but cannot be obtained, and only a security can be had; such an *involuntary* proceeding would not, perhaps, be construed to take away the liability of the treasurer, within the act.

A treasurer, to be considered as such within the meaning of the act, must be a *person elected and accepting the office.*(b)

After one order upon *petition* under the act, the subsequent orders may be obtained on *motion.*(c)

Private Acts.

A jurisdiction is frequently given to the chancellor under private acts. In all these cases, the chancellor strictly follows the authority given him by such acts. It will not be expected that we should detail the various authorities which have from time to time been given under such acts. They live and die with the occasion, and are not of general importance.

- *563 *Under a private act for the sale of estates, directing the conveyance to be such as the court should think proper, the court refused to decide, upon the opinion of a conveyancer, as to what was the proper conveyance, but referred it to the master.(d)

Under a private act of parliament, money was directed to be paid to certain parties: upon petition to the court, the lord chancellor refused to make an order to pay the money to persons deriving title from the original parties, and ordered them to file a bill.(e)

Where a summary power was given to the chancellor by a private act of parliament, to vary the constitutions or provisions of a charity, the lord chancellor refused to increase the number of trustees, or to diminish the number of the quorum; because,

(b) *Ex parte Ashley*, 6 Ves. 444. 8.
P. *Ex parte Ross*, 6 Ves. 803, 4.

(c) *Ex parte a Friendly Society*, 10 Ves. 287.

(d) *Ex parte the Duchess of Newcastle*, 6 Ves. 454.

(e) *Ex parte King*, 2 Bro. C. C. 158.

though his jurisdiction might extend to varying by-laws, or particular provisions, it did not comprise a power to alter the general constitution of the trust itself, and therefore that the application must be to parliament.(f)

Justices of the Peace.

Justices of the peace, as judges of record, appear to have been first created by statute.(g) After their first institution, the choice of them appears to have been in the crown, and assigned by the king's commission, until, says *Prynne*, the statute of the 12 R. 27. by which the chancellor, *treasurer, and clerk of the rolls and others, were appointed "to name and make them." *564 By the 18 Hen. VI. cap. 1. the chancellor alone, "in case there be no men of sufficiency in the county, and where none of twenty pounds per annum are to be found," is enabled to appoint; but if there were men of sufficient estates in the county to be found, *Prynne* was of opinion, that no appointment could be made, unless by the persons mentioned in the before-mentioned statute of Richard.(h) Since this period, however, justices of the peace have been appointed by the king's special commission under the great seal, and the chancellor may displace them at his discretion, though *Prynne* seems to have doubted whether some matter of record should not appear to disable a justice of record.(i) Lord *Somers*, in the time of king *William*, occasioned very considerable ill will, by displacing a number of justices of the peace, who had shown an unwillingness to sign the celebrated association paper in favour of that monarch.

The power of the court of chancery, as to *justices of the peace*, extends only to the putting them in commission; but after they are once in the commission of the peace, this court has no right to punish them for any mal-behaviour: the only redress is, to move the court of king's bench for an information, and afterwards the complainants may apply to this court to turn them out of the commission.(k)

(f) Ex parte Bolton School, 2 Bro. C. C. 662.

(g) Vid. 18 Edw. III. stat. 2, c. 2.; and 34 Edw. III. c. 1.

(h) Vid. *Prynne* in *Somers' Tracts*, 16 vol. p. 446.

(i) Ibid.

(k) Ex parte *Rooke*, 2 Atk. 2.

*CHAPTER IV.

SPECIALLY DELEGATED JURISDICTION.

Idiots and Lunatics.

THE origin of the crown's authority over idiots and lunatics nowhere clearly appears. Lord Coke says the king had not this prerogative when magna charta passed, nor when Bracton wrote, but had it when Britton wrote; and for this he cites Fleta.(a)

The better opinion seems to be, that the right of the crown existed prior to the statute, *De Prærog. Regis*, 17 Edw. II.,(b) and that this statute was but an affirmance of the common law.(c) This point, however, has been justly observed to be more a matter of curiosity than of use.(d)

Before the court of wards was erected, the jurisdiction in cases of idiots and lunatics was exercised in the court of chancery, and, therefore, whilst that court existed, all commissions respecting them were taken out of chancery and returned there; *566 and after the court of wards (a *mischievous court) was taken away by act of parliament,(e) it reverted back to the court of chancery.(f)

The administration of idiots and lunatics' estates is, in virtue of a *personal* authority,(g) committed by the crown, not to the court of chancery, but to a certain great officer of the crown, not

(a) 2 Inst. 14.

(c) Hob. 215.

(b) See Ex parte Grimstone, mentioned 2 Ves. jun. 75. note (n.) and reported in Ambl. 707. See also Oxenden v. Lord Compton, 2 Ves. jun. 71. S. C. 4 Bro. C. C. 232.

(d) Ambl. 707.

(e) 12 Car. II. c. 24.

(f) Corporation of Burford v. Leathall, 2 Atk. 553.

(g) 2 Atk. 553.

of necessity the person who has the custody of the great seal, though it generally attends him, by a warrant from the crown, which confers no jurisdiction, but only a power of administration. *(h)* There is an instance where the lord *high treasurer* had the warrant. *(i)*

The warrant gives a special authority to make a grant of the custody of lunatics and idiots in the right of the crown; and to make grants from time to time of the idiot's or lunatic's estates, *(k)* but extends no further; and the grant being made, the chancellor then acts, not under the warrant, but as keeper of the king's conscience, in the exercise of this branch of the prerogative. If the warrant was granted to any other officer of state, it would not enable that officer to act after the grant made, but merely to direct the grant. *(l)*

*If the power is abused; if any thing wrong is done, or error committed, the appeal is immediately to the king in council, and not in the ordinary course attending the established jurisdictions of the kingdom. *(m)*

The authority of the chancellor being personal, the master of the rolls cannot sit for him in lunacy. *(n)*

The custody of an idiot cannot, it seems, be granted to a man, his executors, administrators, and assigns. *(o)*

Persons are seldom found idiots, but only *non compos mentis*; and when they are found idiots, it is very rarely that the crown has claimed that interest in their property to which it is legally entitled. *(p)*

Though a man be found an idiot by inquisition taken before the sheriff, and by their examination, &c. and the same is returned into chancery; yet he who is so found idiot may, in person,

(h) See *Ex parte Grimstone*, mentioned 2 Ves. jun. 75. note a. and reported in Ambl. 707.; and see also *Oxenden v. Lord Compton*, 2 Ves. jun. 71. S. C. 4 Bro. C. C. 232. *Wigg v. Tiler*, 2 Dick. 552.

(i) 2 Dick. 553.

(k) In the matter of *Hell*, 3 Atk. 635.

(l) *Ex parte Simon Degge*, mentioned in note 4 Bro. C. C. 237. See on this point 2 Atk. 563.; and *Ex parte Grimstone*, Ambl. 707.

(m) 2 Ves. jun. 71. 4 Bro. C. C. 238. in note. See *Lords' Journal*, *Die Martis*, 14 Feb. 1726. 23 vol. Journ. House of Lords, 38. *Sheldon v. Fortescue Aland*, 3 P. Wms. 104.

(n) *Collinson's Law of Idiots and Lunatics*, 1 vol. 105.

(o) *Prodgers v. Phrazier*, 1 Vern. 9. S. C. 2 Show. 171. 2 Ch. Cas. 70.

(p) *Collinson on Idiots and Lunatics*, 1 vol. p. 100.

or by his friends, come into chancery, before the chancellor, &c. and show the matter, and pray that he may be examined before the chancellor, whether he be idiot or not; and if upon examination he is found no idiot, then the inquisition found before the sheriff, and also the examination which the sheriff hath made and returned thereupon, *will be of no effect; but the same will be taken as void, without any other traverse.(q)

One found an idiot had leave to traverse the inquisition, on condition she would appear in person at the trial.(r)

The rules of law and of equity are the same as to what amounts to insanity.(s)

Non compos mentis has been defined by Lord Coke to be a person "who was of good and sound memory, and by the visitation of God has lost it;"(t) and in another work two sorts of persons are considered by Lord Coke to be *non compos mentis*, "1. *idiot*; which from his nativity, by a perpetual infirmity, is *non compos mentis*: 2. he that by sickness, grief, or other accident, wholly loseth his memory and understanding."(u)

When the disease of lunacy is excessive, a common observer may positively pronounce upon it; but the first inroads of the complaint must often be imperceptible even to the most practised eye. As the eloquent D'Aguesseau observes, "the doubtful and uncertain point at which reason disappears, and where incapacity becomes evident and manifest, can only be fixed by the particular circumstances of each individual case."

*569 In the eye of the law, a lunatic is never looked *upon to be desperate, but always at least in a possibility of recovering.(v)

Being *non compos*, of unsound mind, are certain terms in law, and import a total deprivation of sense. There may be weakness of mind that may render a man incapable of governing himself from violence of passion, and from vice and extravagancies, and yet not sufficient, under the rule of law, and the constitution of this country, to authorize a commission.(w)

(q) In the matter of Heli, a lunatic, 3 Atk. 635.

(r) Mos. 71.

(s) Bennet v. Vada, 2 Atk. 327. Osmond v. Fitzroy, 3 P. Wms. 130.

(t) Beverley's case, 4 Co. 124.

(u) Co. Litt. 247. a. As to the forms

of commissions in cases of lunacy, idiocy, &c. see Mr. Vesey's note to Ex parte Cranmer, 12 Ves. 451. and his judicious observations on those forms.

(v) Dormer's case, 2 P. Wms. 265.

(w) Ex parte Barnaley, 3 Atk. 173.

"*Lunatic*," says Lord Hardwicke, "is a technical word, coined in more ignorant times, as imagining these persons were affected by the moon; but it is discovered by philosophy and ingenious men that it is entirely owing to a defect of the organs of the body;"(x) Blackstone, however, seems to attribute lunacy to the influence of the moon:(y) but the idea, though very ancient and prevalent, is, certainly, considered as erroneous.

The first proceeding to obtain a commission of lunacy is to present a petition to the chancellor, stating the party's incapacity, and praying a commission; accompanied by affidavits evincing the lunacy of the party. On this petition and affidavit, a commission will be issued under the great seal, in which five commissioners are named, though the attendance of three is sufficient.(z) If the commission is to be executed in *the* *570 country, two of them must be barristers, the remainder attorneys; or such persons as the chancellor may approve. If the commission is to be executed in or near town, the commissioners are all nominated by the chancellor.

If a caveat has been entered, and the commission is to be executed in the country, the party against whom the commission is prayed will have leave to present a list of commissioners in addition to the list of the party applying for the commission:(a)

The commission must be executed within a month after it is obtained. Upon notice to the commissioners they issue a warrant to the sheriff of the place where the party resides, directing him to summon a jury of twenty-four persons. If the witnesses will not voluntarily attend, the commissioners may sign and seal a subpoena to be served upon them; a power they exercise, not under any positive provisions of an act of parliament; but by implication, and as necessary to enable them to execute the commission, the commissioners exercising the authority which before belonged to the *escheator* or *sheriff*,(b) under the old writ.(c) The jury, which must consist of at least twelve persons, are sworn, and the commissioners explain the

(x) *Ex parte Barnsley*, 3 Atk. 174.

(y) 1 vol. Comr. 304.

(z) High. on Idiots and Lunatics, 242.

(a) 2 Coll. Idiots and Lunatics, 152.

(b) See *Ex parte Lund*, 6 Ves. 784.

(c) See Fitzh. Nat. Brev. 530. Sed qu. whether a writ was ever directed to the *escheator*, to inquire of lunacy as in the case of idiocy. *Ex parte Southcote*, Amb. 111. 8. C. 2 Ves. 401.

business to them; *the witnesses, and the supposed lunatic, if necessary, are examined, and the jury sign the inquisition on paper. On the following day the inquisition is engrossed on parchment and signed by the commissioners and the jury. The inquisition must be returned into chancery within a month after it is obtained.(d)

The order that the jury shall be of the neighbourhood is usual, and is consequential upon the direction that the commission shall be executed at the place of abode.(e)

The commissioners and jury have a right to inspect the person of the lunatic, and examine him before them, and commonly do, and this without an order of the court for that purpose; and if the persons in whose custody he is, have refused to produce him, the court has blamed them extremely, and made them pay costs.(f) and might, it seems, commit them.(g)

The *non compos* is entitled to be present, if he thinks proper, at the execution of the commission.(h)

The granting of a commission of lunacy is matter of discretion in the person granting it, and is not in all cases granted, whenever the fact of lunacy is established.(i)

*572 There may be cases, says Lord Eldon, where *the granting the commission might for ever prevent a cure.(k)

On the petition of a creditor,(l) or even of a *stranger*, a commission of lunacy will be ordered to be issued, without regard to the motives of the person applying for the commission.(m)

If a clergyman becomes *non compos*, and the duties of the church are not performed by some other person, the churchwardens may, *ex officio*, apply for a commission of lunacy; and with the permission or approbation of the bishop of the diocese, obtain sequestration, and employ a proper curate, or the bishop or archbishop may appoint a curate.(n)

(d) Highmore on Idiots and Lunatics, p. 242., and Collinson, 1 vol. 140.

(e) Ex parte Hall, 7 Ves. 264.

(f) Ex parte Southcote, 2 Ves. 405. S. C. Amb. 111.

(g) Lord Wenman's case, 1 P. Wms. 701.

(h) Ex parte Cranmer, 12 Ves. 455.

(i) Ex parte Tomlinson, 18 Ves. 58.

(k) Ib.

(l) In matter of Bell, 1 Collinson on Idiots and Lunatics, 377.

(m) Ex parte Ogle, 15 Ves. 112.

(n) 1 Collinson on Idiots and Lunatics, 361.

A commission of lunacy may be ordered against a person resident *abroad*, to be executed in the county where the mansion house lies.(n) The commissioners cannot extend the commission beyond sea, as in the case of a commission to appoint a guardian, because the authority is not in them alone, but in the jury too.(o)

When a commission issues, the commissioners issue their precept to the sheriff to summon a jury, which must consist of twelve persons at least, and twelve persons of the jury must concur.

A commission, not of lunacy, but in the nature of a *writ de lunatico inquirendo*, may be issued, where the party is from any cause, whether age, disease, affliction; or intemperance, incapable of managing his own affairs.(a) This doctrine, however, seems to have sprung up since Lord Hardwicke's time,(b) and was rather arbitrarily introduced; so much so, that it has more than once been hinted that some legislative provision on the subject would be proper. Many difficult and delicate cases with regard to the liberty of the subject may arise out of the doctrine.(c) Such is the perishable fabric even of the finest genius, that Lord Somers, the Duke of Marlborough, Dean Swift(d) and Lord Mansfield, might at the close of their lives have been made the subject of such a commission.

The proceedings on the commission, to inquire whether or not the party be *non compos*, are on the law side of the court of chancery, and can only be redressed, if erroneous, by writ of error, in the regular course of law.(e)

If the *non compos* dies before office found, no inquisition can be taken.(f)

(n) Ex parte Southcote, Ambl. 109. S. C. 2 Ves. 401.

(o) Ib. p. 112.

(a) Vid. 1 vol. Black. Comm. p. 304. Gibson v. Jeyes, 6 Ves. 273. Ridgeway v. Darwin, 8 Ves. 65. Ex parte Cranmer, 12 Ves. 445.

(b) See Lord Donegal's case, 2 Ves. 407., and the case mentioned in p. 408, before Lord Harcourt.

(c) Sed Vide Ridgeway and Darwin, 8 Ves. 68., and Ex parte Cranmer, 12 Ves. 445.

(d) "From Marlborough's eyes the streams of deluge flow,
"And Swift expires a drivelier and a show."

(e) 3 Black. Comm. 427.

(f) 4 Co. 127. a.

Magistrates only, and not persons of rank, are within the act (g) that empowers justices of the peace to take care of lunatics. (A)

- *574 *Where the lunatic's fortune is small, references to the master, in the first instance, have been ordered, to see what is proper to be allowed the lunatic for maintenance; to avoid the expense of a commission. (i) And where the property has been small, (500*l.* for instance,) the court has, to avoid the expense of a commission of lunacy, (which is about 120*l.*) upon affidavits of the petitioner's mind and the amount of her fortune, ordered payment, without a reference to the master, of the dividends of the two next quarters, and then to apply again, by a short petition; so that the court might know the state of the party's mind, and the amount of her fortune, from time to time. (k)

In a case where there was a fund in court payable to the plaintiff, the husband, who was of too great imbecility, in consequence of a paralytic stroke, to do legal acts, the interest was, on petition, ordered to be paid to the wife, from time to time. (l)

So, where a wife became insane, who was entitled to separate property, but no commission had issued, and the husband made an application for an allowance; inquiries were directed as to the husband's ability to support her; but it seems that neither with nor without a commission of lunacy could the chancellor order an application of her separate income, unless by way of arrangement. (m)

- *575 *By the statutes, 8 and 18 Hen. VI. there ought to be a month's time between the return of the inquisition, and the grant of the custody and land, to enable parties to come in and tender a traverse. (n)

A traverse may be tendered at any time, (o) upon giving security to the value of two years' profits of the lands. (p)

The uniform return in inquisitions of lunacy, except in a few instances, is, *lunaticus; non compos mentis; or, insanimentis*, or,

(g) 17 Geo. II. c. 5. s. 20. See also the 48 Geo. III. c. 96. s. 10, 20.

(h) 2 Atk. 51.

(i) *Machia v. Saffield*, 2 Dick. 634, and the cases there mentioned.

(k) *Eyre v. Wake*, 4 Ves. 795.

(l) Bird against Le Fevre, 4 Bro. Ch. Cas. 101.

(m) See *Brodie v. Barry*, 2 Ves. and Bea. 36.

(n) *Ex parte Roberts*, 3 Atk. 7.

(o) 2 Edward VI.

(p) 1 Collinson, 169.

since the proceedings have been in English, of unsound mind. (q) A return, that A. B. is incapable of governing himself and his lands, &c. is a void return. (r)

The return to the inquisition cannot be objected to, because it merely states the party to be a lunatic, and the time the lunatic has been so; but does not state that the lunatic has, or has not, lucid intervals. (s)

If there is any misbehaviour in the execution of an inquisition, it will be examined into, and, if the court see cause, they may quash it, and direct a new commission. (t)

A *malus inquirendum* is grantable only at the instance of the crown, which cannot traverse as the subject can. (u)

It is not unusual for the chancellor to inquire *by inspection *576 after an inquisition returned; (v) but if upon such inspection he is doubtful, he puts the party to his *traverse* as provided by the statute. (w)

It has been held that a *traverse* cannot be had without the consent of the chancellor; (x) though the statute seems to entitle the party to it as of right.

And where a person has been found a lunatic under two inquisitions, the court will not allow him to *traverse* the second; (y) but the chancellor may afterwards direct an issue. (z)

It is clear, the custody of the lunatic cannot be suspended without leave of the court; and on that account, probably, applications were made for the consent of the court to *traverse*. (a) Not only the lunatic, but the heir of the lunatic, is bound upon the *traverse* of the inquisition. (b)

The act of the 34 Edw. III. c. 14. gives the lunatic a right

(q) Ex parte Barnsley, 3 Atk. 171.; and see Ex parte Cranmer, 12 Ves. 455.

(r) Ib. 3 Atk. 188; etc.

(s) Ex parte Wragg, 5 Ves. 480.

(t) Ex parte Roberts, 3 Atk. 6. Ex parte Barnsley, 3 Atk. 185.

(u) 3 Atk. 6.

(v) See Skin. 5.

(w) 2 Edw. VI. c. 8. s. 5. 3 Atk. 6. 312.

(x) 3 Atk. 6. Sir John Cutts's Case, Ley, 86, 87.; but see Ex parte Barnsley, 3 Atk. 185.

(y) Ex parte Barnsley, 3 Atk. 184.

(z) Ex parte Holyland, 11 Ves. 10.

(a) 3 Atk. 6. Vid. in Stone's Case, in Tremain's Pleas of the Crown, 653. and Lane's Entries, 662. precedents of a *traverse*; and for the doctrine of *traversing* an inquisition, vid. 4 Co. 54. b. the case of the Community of the Saddlers; and 8 Co. 166. Paris Stoughton's Case, Sir T. Jones, 198. Show. 199. Skinn. 45. S. C. 3 Atk. 7.

(b) Robert's Case, 3 Atk. 319.

to traverse, and by the 2d Edw. VI. c. 6. s. 6. it is very fully provided, "if any shall be untruly found lunatic, or idiot, that every person or persons grieved by any such office or inquisition, shall and may have his or their *traverse to the same, immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices founden."¹²

A person cannot traverse an inquisition without bringing the lunatic in *propria persona* before the court. (d) It is the same as to idiots. With respect to idiots, the rule is laid down in *Fitzherbert*, (e) and the rule is the same as to lunatics. (f) An idiot cannot traverse by attorney, but a lunatic may.

Upon a petition of the lunatic to the chancellor, or if the lunatic be a married woman, upon a petition of the husband and wife for leave to traverse the inquisition, the traverse is allowed, as of right, and proceedings under the commission, and taking possession of the property, are suspended. The pleading a traverse is short. You merely state the inquisition, take the common traverse upon it, and the attorney general joins issue; and the record may then be immediately sent to the court of king's bench; (g) the only court in which a traverse can be tried. (h)

If the commission is traversed with success, no costs can be given to the party taking out the commission, however meritorious; because, no *property coming to the possession of the crown, there is no fund out of which to pay them. (i)

A person having an interest under a contract with the lunatic, an *alienee* for instance, (k) or a person who has contracted to sell property to the *non compos*, (l) is entitled to traverse; (m) but a mere stranger, having no interest, is not, it seems, allowed to traverse. (n) If a party submitting to a traverse refuses afterwards to be bound by it, it is considered as a contempt. (o)

(d) In the matter of *Heli*, 3 Atk. 635.

(e) *Fitzb. Nat. Bro.* 532.; and see

Anon. Moseley, 171.

(f) 3 Atk. 635. *Ambl.* 112.

(g) *Ex parte Wragg*, 5 Ves. 462. 8.

C. 5 Ves. 83².

(h) See on this subject, 4 Burr. 851.

(i) *Ex parte Ferne*, 6 Ves. 832.

(k) *Ex parte Roberts*, 3 Atk. 312.; and see 15 Vin. Abr. 141.

(l) *Ex parte Morley*, 9 Ves. 478.

(m) *Ex parte Hall*, 7 Ves. 202.

(n) *Ex parte Ward*, 6 Ves. 578. See *Vid. Ex parte Southcote*, *Ambl.* 112.

(o) *Ex parte Roberts*, 3 Atk. 308.

An improper attempt to traverse will be dismissed with costs.(p)

An inquisition is only *presumptive evidence* of insanity, and not conclusive: so that upon an action in respect of any contract or deed, it is for a jury to determine whether, at the time of executing it, the party was *non compos*, though by the inquisition he was found to be *non compos* at such period.(q)

So, if the question of sanity arises in a court of equity, an issue will be directed.(r)

A commission of lunacy may be *superseded*, if the party is improperly or irregularly(s) found **non compos*, and a caveat *579 may be entered by the person against whom the commission has issued, or any individual on his behalf, against the appointment of committees, on the ground that he has unjustly been found a lunatic; and upon a petition by the lunatic or such other person, in his name,(t) to supersede the commission, a time will be appointed for his personal appearance before the chancellor, in order to be inspected and examined; but without very strong evidence, and the affidavits of eminent physicians, as to his sanity and capacity, the chancellor will not set aside the verdict of the jury.(u)

In one case, when the lunatic was recovered, and examined in court, the commission was superseded, and the recognisance of the committee ordered to be vacated, the lunatic declaring himself satisfied with the account.(v)

In another case, a lunatic having recovered his understanding, petitioned to have the commission superseded, but the court only superseded it for some months, to see if he was perfectly recovered, because he had often relapsed, and was found by the inquisition a lunatic with lucid intervals.(w) An issue is sometimes directed.(x)

*In order to supersede a commission, Lord *Thurlow* was of *580 opinion, that where lunacy is once established by clear evi-

(p) 1 Collinson on Id. and Lun. 462.

(q) *Faulder v. Silk*, mentioned, 1 Collinson on Id. and Lun. 396.

(r) *Hall v. Warren*, 9 Ves. 605.

(s) *Ex parte Roberts*, 3 Atk. 6.

(t) *Ex parte Stanley*, 1 Ves. 25.

(u) *Harrison's Ch. Prac.* 383. Newl.

edition. 1 Collinson on Id. and Lun. 321.

(v) *Mos.* 78.

(w) *Mos.* 421.

(x) *Ex parte Stanley*, 1 Ves. 25.

dence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory;(y) but Lord *Eldon* did not concur in that proposition: something less than the same perfection of mind, he thought, would be sufficient.(z)

A commission of lunacy kept back for several years without putting it in execution, is a contempt of the court, and will be discharged with costs.(a)

If upon the return of the inquisition the party is found a lunatic, and such finding is not traversed, or the commission superseded, committees of his *person* and *estate* are, by letters patent, appointed by the chancellor, under the authority derived to him from the king's sign manual. The chancellor (unless the estate is extremely small) usually refers it to a master to approve of a proper person to act as committee.(b)

The committee of the person is frequently appointed committee of the estate also.(c)

A *master in chancery* cannot be appointed committee of the lunatic's estate.(d)

*581 *Where no one can be procured to act as *committee* of the estate, a receiver may be appointed with a salary, upon giving such security to the *attorney general* as a committee does.(e) In cases, likewise, where the committee resides at a *distance* from the estate,(f) or is infirm, or where it has not been thought expedient to intrust the committee with the property, a receiver has been appointed.(g)

In one case, the brother of the committee, not being able to give the usual security required from a committee, was appointed committee of the personal estate of the lunatic, with a restriction not to receive any sums of money, part of the lunatic's estate; and a receiver was appointed to account and pay the balance to the accountant general, after paying what should be allowed to the petitioner for maintenance of the lunatic.(h)

(y) *Attorney General v. Parther*, 3 Bro. C. C. 444.

(z) *Ex parte Holyland*, 11 Ves. 10.

(a) 2 Atk. 52.

(b) See 1 Collinson, 194, 5.

(c) *Ib.* 256.

(d) *Ex parte Fletcher*, 6 Ves. 427.

(e) *Ex parte Warren*, 10 Ves. 612.

(f) 1 Collinson's *Id.* and *Lun.*

(g) *Ib.* 257.

(h) *Ex parte Billingham*, *Ambl.* 104.

The old rule adverted to by *Blackstone*,⁽ⁱ⁾ and with seeming approbation, that the next of kin of a lunatic, if entitled to his real estate upon his death, could not be a committee of his person, has not been adhered to for a great length of time ;^(k) nor is it an objection to a committee that he is the next of kin to the lunatic, and will come in *for a share of his *personal property un-* *582 *der* the statute of distribution.^(l)

It is usual to take bonds from committees to account and submit to orders, but it does not appear to be absolutely necessary, for orders may be enforced independent of the bond ;^(m) and where bonds have been taken, they have on circumstances been ordered to be delivered up,⁽ⁿ⁾ or greater security taken.^(o)

So, with regard to committees finding *securities*, the chancellor, it seems, exercises a discretion. A bond by the committee and two sureties, approved of by the attorney general, at double the amount of the outstanding estate, is what is usually required.^(p)

It has been found inconvenient to grant the custody of a lunatic to two,^(q) for, being a joint grant, and a mere authority without any interest, the death of one determines the right to the custody of the lunatic :^(r) it is, however, in practice, usually done.^(s)

If the committee of a lunatic becomes a bankrupt, it is a ground for his removal ; but the *custody of the person will not *583 be changed, if it is necessary to the comfort of the lunatic.^(t)

If persons in whose custody the lunatic is, refuse to deliver him to the committee, they incur a contempt of court, and may

(i) 1 Com. 305.

(k) Ex parte Cockayne, 7 Ves. 591. ; and see Ex parte Seaman, 1 Collinson, 207. Dormer's case, 2 P. Wms. 262.

(l) Ex parte Neal, 2 P. Wms. 544. The arguments urged for the decision in this case, as well as in Ex parte Ludlow, *ib.* p. 638. are not very forcible, though the decision itself seems proper.

(m) Ex parte Grimstone, Amb. 707. Ex parte Robert, 3 Atk. 5. 308.

(n) Ex parte Northlight, 2 Ves. 673.

(o) Ex parte Pereira, 2 Ves. 674.

(p) 1 Collinson's Id. and Lun. 262, 3.

(q) Ex parte Ludlow, 2 P. Wms. 638.

(r) Ex parte Lyne, For. 143. ; and see Eq. Cas. Abr. 583.

(s) 1 Collinson, 227. ; see For. 143. S. P. Anon. M. 8.

(t) Ex parte Mildmay, 3 Ves. 2. ; and see Smith v. Bate, 2 Dick. 631.

be committed; nor is an *habeas corpus* necessary.(u) but may be had recourse to if considered as eligible.(u)

The committee of a lunatic's estate is never allowed any thing for his *care and trouble*;(v) but, under circumstances, the court will increase the allowance of maintenance, which will operate as an allowance for trouble.(w) A committee will not be allowed moneys expended on the lunatic's estate, if laid out without a previous application to the court;(x) and if the committee has not passed his accounts regularly according to his recognisance, and as required by the general order,(y) he will not be allowed *his costs*;(z) nor is a committee suffered to pass his accounts, without referring them to the master to see what sums he has had in his hands from time to time; and, if he is found to have kept money in his hands unnecessarily, he must pay interest for it.(a)

In passing accounts from time to time of a lunatic's estate, *584 notice should be always given to *such of the lunatic's relations to attend before the master to check the account, as would be entitled to a share of his estate, if he had been dead intestate; but they are not to be allowed the costs of such attendance, unless some special case be laid before the court.(b)

If a committee disobeys an order to pass his accounts, it is punishable as a contempt.

A bill lies by the attorney general, on behalf of a lunatic, against his committee, for an account of, and to secure the lunatic's property,(c)

The committee of a lunatic cannot make leases, nor encumber the lunatic's estate, without leave of the court.(d)

By the 11 Geo. III. c. 30. a committee may, under the authority of the great seal, renew leases upon lives, the fines pay-

(u) Ex parte Tranmer, 12 Ves. 455.

(v) Blunt v. Clitherow, 6 Ves. 302. Anon. 10 Ves. 104.

(w) Ambl. 78.

(x) Ex parte Marton, 11 Ves. 397. Ex parte Hilbert, lb. Attorney General v. Vigor, 11 Ves. 583.

(y) 15th December, 1792.

(z) Ex parte Clarke, 1 Ves. jun. 296.

(a) See Ex parte Hilliard, 1 Ves. jun.

90. Ex parte Catten, 1 Ves. jun. 156.; and see Ex parte Chumley, lb. Pocotke v. Riddington. 5 Ves. 794.

(b) Ex parte Wright, 2 Ves. 25.

(c) Attorney General v. Parmer, 2 Dick. 748.

(d) Foster v. Marchant, 1 Vern. 262. See 43 Geo. III. c. 75. s. 4.

able upon such renewal, to be applied as the chancellor shall direct.

Where a lunatic has an estate for life, or other estate, with a power of granting leases for lives or years, such power may be executed by the committee, under the direction of the great seal.(e)

So, a committee, under the direction of the chancellor, may surrender leases, in order to obtain renewals for the benefit of the lunatic; but *such renewed leases operate to the same uses *585 as the former leases.(f)

The assets of a *non compos*, after his death, are distributable only by bill.(g)

A motion, therefore, by the committee, after the death of the lunatic, for a reference to ascertain his next of kin, in order that the money in his hands might be distributed, was refused; such reference being made only on a bill filed against the committee for an account of the lunatic's property.(h)

If the committee *misconducts* himself,(i) or becomes *bankrupt*,(k) he will be removed.

The lunatic's estate, though in *Ireland* or *Scotland*, is under the jurisdiction of the chancellor.(l)

In the management of the lunatic's estate, the benefit and comfort of the lunatic, where no creditor complains, is the great object of the court,(m) without looking to the interests of those who, upon his death, may have eventual rights of succession.(n) The chancellor administers the lunatic's estate, *tanquam bonus paterfamilias*.(o) The court may apply the personal estate in payment of the debts to any extent, and will take every advantage that tends fairly towards *ordinary improvement, consider- *586 ing only the immediate interest of the proprietor; but consist-

(e) 43 Geo. III. c. 75. s. 3.

(f) 29 Geo. II. c. 31.

(g) Wigg v. Tyler, 2 Dick. 552.

(h) Gilbert Ex parte, 1 Ball and Bea. 297.

(i) Lloyd v. Mar, 2 Dick. 460. Ex parte Jones, 13 Ves. 313.

(k) 1 Collinson, 313.

(l) See Ex parte Marchioness of Anandale, Amb. 80.; but see contra, as

to Ireland, in matter of Duchess of Chandos, 1 Seb. and Lefr. 301.

(m) Dormer's case, 2 P. Wms. 265. Ex parte Chumley, 1 Ves. jun. 236. Ex parte Baker, 6 Ves. 8.

(n) Oxenden v. Lord Compton, 2 Ves. jun. 70. and S. C. 4 Bro. C. C. 233.

(o) Ib. 73.

ently with that, alteration of property is as far as possible to be avoided, *(p)* and care taken that nothing extraordinary is attempted, as estates bought, or interests disposed of. *(q)*

The committee of a lunatic's estate is not authorized to purchase real estate with savings, and alter the nature of the property; and land so purchased will be considered as personal estate. *(r)*

There is no equity between the real and the personal representatives, after the death of a lunatic, to have property, which was altered by the court, restored; therefore, the produce of timber on the estate of a lunatic, cut and sold by order, on a report that it would be for his benefit, is personal assets. *(s)*

The estate, as the statute *(t)* provides, is to be preserved from waste; but that is to be understood with latitude; for repairs and payment of mortgage debts are not within it. *(u)*

A committee of the real estate of a lunatic may exercise the *587 same power over it, in regard *to cutting timber for repairs, as any discreet owner might do. *(v)*

Money may be laid out in *improvements*, if no good reason be shown why it should not. *(x)* But in these cases the committee acts at his peril, unless he has previously procured an order of the court, *(y)* which it is always prudent to obtain.

If a trustee of money in the funds be *non compos*, the bank must transfer the same as the *court of chancery or exchequer* shall direct; *(z)* but a lunatic abroad, under a judicial proceeding in *Amsterdam*, in the nature of a commission of lunacy, is not within the provisions of the act. *(a)*

The committee of a *non compos* may, under the directions of the chancellor, complete the contracts or engagements made when the lunatic was of sound mind. *(b)*

(p) See Ambl. 31.

(q) Ib.

(r) Audley v. Audley, 2 Vern. 192.
S. C. 1 Dick. 16.

(s) Oxenden v. Lord Compton, 2 Ves. jun. 69. S. C. on petition, Ex parte Bromfield, 1 Ves. jun. 453. Same cases reported, 3 Bro. C. C. 510. 4 Bro. 231.

(t) 17 Edw. II. c. 10.

(u) Ex parte Grimstone, see 2 Ves.

jun. 75. in note. S. C. Ambl. 708. 4 Bro. C. C. 238.

(r) 2 Atk. 407.

(x) 2 Ves. jun. 75. in note; and see Sergeson v. Sealy, 2 Atk. 413.; but see 1 Vern. 263.

(y) See 10 Ves. 104., and Ex parte Hilbert, 11 Ves. 397.

(z) 36 Geo. III. c. 90. s. 1.

(a) Sylva v. Da Costa, 8 Ves. 316.

(b) 43 Geo. III. c. 75. s. 1.

Debts (unless for necessities) contracted by a *non compos* are not binding; but are, if contracted before he was *non compos*: and an action may be brought against him, and his person may be taken in execution.(c)

The creditors of a *clergyman, non compos, may sequester his living*;(d) and a creditor may take *leasehold property of the *588 lunatic in execution, and the chancellor cannot restrain it.(e)

Formerly, the chancellor could not, upon a petition in lunacy, order part of the lunatic's real estate to be sold for payment of his debts, to prevent a bill by creditors.(f) But a committee may now, in pursuance of the statute,(g) order the estate to be sold for those and other purposes,(h) and at the discretion, and under the directions of the great seal, raise money on a mortgage of the lunatic's estate, for payment of debts; but money in the funds will not, though under the control of the chancellor,(i) be applied in payment of the lunatic's debts, unless it be necessary for his accommodation.(k) There is no instance of an order on behalf of creditors putting the lunatic in a state of absolute want.

If a lunatic, found such by inquisition,(l) be a mortgagee, the court, under the statute, 4 Geo. II. c. 10. may order a conveyance; and where one was declared a lunatic at *Hamburgh*, and a curator appointed there, the lunatic and curator were ordered to join in a conveyance.(m)

By the same act,(n) a *non compos*, or committee in his name, may convey property of which he *is a trustee to the persons *589 beneficially entitled, or as they shall direct.

The tenant of a lunatic's estate may be restrained, on petition, from committing waste, though no bill be filed.(a)

Neither the lunatic, nor his committee, can present to a vacant

(c) See 1 Collinson on Id. and Lun. 376., and 13 Ves. 590. there cited.

(d) 14 Ves. 182.

(e) Ex parte Dikes, 8 Ves. 81.

(f) Ex parte Smith, 5 Ves. 556.; and see Ex parte Dikes, 8 Ves. 79.

(g) 43 Geo. III. c. 75.

(h) See 1 Collinson on Id. and Lun. 384.

(i) See 36 Geo. III. c. 90. s. 3.

(k) Ex parte Hastings, 14 Ves. 182.

(l) See Ex parte Gillam, 2 Ves. jun. 587.

(m) Ex parte Marchioness of Annandale, Ambl. 80.

(n) 4 Geo. II. c. 10.

(a) In the matter of Creagh, a lunatic, 1 Ball and Bea. 108.

benefice, but the chancellor must present ;(b) and he usually presents a relation of the *non compos*.

The chancellor may order *maintenance* for the children of the lunatic,(c) or a sum for their *advancement*, or payment of their *debts*.(d)

In case a visitor of a charitable institution becomes *non compos*, the visitatorial authority devolves upon the crown, to be exercised by the chancellor.(e)

Formerly, it seems, the committee of a *non compos* could not, in any case, grant copyholds, he having no estate in the manor; but, singular as it may appear, the *non compos* might, by his steward, make such grants, according to the custom of the manor ;(f) and now, by the statute, 43. Geo. III. c. 75. the copyhold estates of persons found lunatic, or of unsound mind, may,
 *590 *under the directions of the great seal, be sold, charged, or encumbered by way of mortgage, or otherwise, as shall be deemed most expedient for raising such sums of money as shall be necessary for the payment of their debts, or performance of their contracts or engagements, and a power is given to grant leases, under the directions of the great seal.

A *non compos*, it has been determined, may be steward of a manor, and, as such, grant copyhold estates.(g)

If a lunatic be a trustee of *stock*, and refuses to transfer, a transfer may be ordered in pursuance of a late statute ;(h) not is it necessary, in order to obtain relief under this act, that the lunacy should be found by inquisition, if otherwise made apparent.(i)

If a charge on a lunatic's estate falls in to him, as representative of his sister, it sinks for the benefit of the heir.(m)

The chancellor may alter or discharge an order of his predecessor.(n)

(b) 3 Bac. Abr. 295.

(c) Foster v. Marchant, 1 Vern. 262.

(d) See cases mentioned, 1 Collinson on Id. and Lun. 296, 7.

(e) 1 Collins. Id. and Lun. 363., and Attorney General v. Dixie, 13 Ves. 519., and Ex parte Bosworth School, Ib. 535. there cited.

(f) Blewit's case, Leon. 47. cit. 1 Collinson, 454.

(g) Mir. c. 2. s. 20. Shepherd G. 115.

Bryd. 99. cited 1 Collinson on Idiots and Lunatics, 455.

(k) 36 Geo. III. c. 90. s. 1,

(l) Sims v. Naylor, 4 Ves. 360. overruling, it seems, the doctrine in Ex parte Gillham, 2 Ves. jun. 587.

(m) Lord Compton v. Oxenden, Bart. 4 Bro. C. C. 397. S. C. 2 Ves. jun. 261.

(n) Lord Annandale's case, 4 Bro. C. C. 235. Ludlam's case, mentioned in 1 Collinson, 104.

An order does not abate by the lunatic's death, but any party may still prosecute it, and *procure the master's report ;(o) and *591 orders in lunacy may be made after the death of the lunatic, upon a report made, or petition presented, previous to the lunatic's death.(p)

The chancellor has refused access to a lunatic, by a person entitled upon the death of the lunatic, in default of an appointment by her, to see whether she was in a state to exercise the power. There is no instance of an order for access to the lunatic, upon the principle of *quia timet*.(q)

By the 15 Geo. III. c. 30. it is provided, that the marriage of a person duly found a lunatic, shall be null and void, unless he be previously declared sane by the lord chancellor, or his trustees ; but it seems necessary that the marriage of a lunatic should be declared void by a sentence of the ecclesiastical court.(r) A person marrying a *non compos*, the custody of whom has been consigned to a committee, is a contempt of court ;(s) and persons accessory to the marriage of a *non compos*, would, it seems, be ordered to attend the court, and, on refusal, committed.(t)

It is not within the plan of this work to consider the doctrines of the common law, respecting idiots or lunatics. For these the *reader is referred to the common law writers. Their *592 liability in civil and in criminal cases is copiously treated of in those writers. With a few observations, therefore, we shall close this subject of the chancellor's jurisdiction.

If an action for debt is brought by a lunatic, the creditor may petition for a commission of lunacy, and all legal proceedings will be staid on payment of the money into court.(u)

Suits may be instituted in equity on the behalf of a *non compos*.(v)

(o) *Ex parte Armstrong*, 3 Bro. C. C. 238.

(p) *Ex parte Grimston*, Amb. 706. *Ex parte McDougal*, 12 Ves. 384.

(q) *Ex parte Lyttleton*, 6 Ves. 7.

(r) *Ex parte Turing*, 1 Ves. and Bea. 140.

(s) *Ashe's Case*, Pre. Ch. 203. Eq. Cas. Abr. 278.

(t) *Stuart v. Taylor*, 9 Mod. 98. This was the case of an idiot, but the same doctrine seems applicable, in principle, to a lunatic.

(u) 1 Collins. Id. and Lun. 341.

(v) *Attorney General v. Tiler*, 1 Dick. 378.

So, suits may be brought against a *non compos.* The mode in which the answer must be put in, in such case, has before been adverted to. (w)

It seems, that a lunatic cannot plead his lunacy, either at law (x) or in equity; (y) but after an inquisition found, his committee, it seems, may, and, in a suit by him and the lunatic, may avoid his acts from the time he is found to have been *non compos.* (z) In some cases the lunatic has not been allowed to be a party to a suit, to be relieved against an act done during his lunacy, (a) as it would have the effect of stultifying himself; but *593 it has been held he may be a party to a suit to enforce *performance of an agreement entered into prior to his lunacy, (b) to which no such objection was applicable; and the better opinion seems to be, that a lunatic may be a party to a bill by his committee, to set aside acts done during his lunacy; (c) but that he cannot, without his committee, file a bill, or, if he does, it may be demurred to, if the lunacy appears on the face of the bill; (d) or pleaded to, if it does not so appear. (e)

Instruments of record, executed by a lunatic, cannot be set aside at law, though a court of equity would afford relief. (f) If, by an oversight of a judge, he is permitted to levy a fine, (g) or to suffer a recovery, they will be valid; but if a tenant to the præcipe be made by deed, (h) or if the party appear by attorney, (i) unless it be under a letter of attorney, *acknowledged before a judge,* (k) the recovery might be set aside; for a lunatic cannot execute a deed, or appoint an attorney. (l) *Brydall* puts the question, whether a king, during the time of his insanity, is capable

(w) Ante, p. 233.

(x) See *Stroud v. Marshall*, Cro. Eliz. 298. U. 4. and *Cross v. Andrews*, Ib. 622.

(y) See 1 *Collinson on Id. and Lun.* 402. *Beverley's Case*, 4 Co. 124. 1 Fonbl. Eq. 48. n. (E) Sed vid. *Yates v. Boen*, 2 Str. 1164.

(z) *Clarke v. Clerk*, 2 Vern. 412. *Addison v. Dawson*, 2 Vern. 678. cit. 1 Fonbl. Eq. 48. n. (E.)

(a) Attorney General on the part of *Smith v. Packhurst*, 1 Ch. Cas. 112.

(b) *Attorney General v. Woolrich*, 2 Ch. Ca. 153.

(c) *Ridler v. Ridler*, Eq. Cas. Apr. 279. See on this subject, Co. Lit. 2. b.

(d) See ante, p. 233.

(e) Ante, 243.

(f) *Toth*. 42. 2 Vern. 678.

(g) 4 Co. 124. *Anon.* 4 T. R. 306.

(h) 3 Atk. 312. 2 Ves. 403.

(i) 4 Co. 124. 3 Atk. 112.

(k) *Hume v. Burton*, 5 Cruise's Dig.

518.

(l) See these cases fully stated, 1 *Collinson on Id. and Lun.* 413, etc.

of making peace, and relies on the opinion of Grotius in the negative.(m)

In general, a will by one *non compos* is bad; but a devise by a lunatic to charitable uses, has been considered as effectual under the saving. *words in that statute.(n) These, however, are *594 mere points of law, on which we are not called upon to dilate.

Though at law, and, in general, in equity, every act of the lunatic, subsequent to the period at which a person is proved to be a lunatic, is void, according to the maxim, *furiosus nullum negotium gerere potest quia non intelligit quod agit*; yet a court of equity has refused to enter into the consideration of a party's sanity, to impeach a conveyance made by such party after a lapse of twenty years, and two subsequent purchases:(o) so, also, a court of equity, owing to the great inconvenience, will not assist a party in giving effect to the legal consequence of lunacy, by setting aside contracts or dealings in the course of his trade.(p) The interference, however, of courts of equity, in cases of this description, depends upon the circumstances of each case, and no general rule can be laid down:(q)

Agreements made by a sane person will not be affected by subsequent insanity, but will be specifically enforced.(r)

All acts done during a lucid interval are valid. Many questions have arisen upon the execution of wills during lucid intervals; and the intervals having been proved, the wills have been held valid and effectual. The law is the same with respect to contracts, or any other disposition of property. *An absolute *595 conveyance made in a lucid interval is valid.

If, however, general lunacy is established, it is necessary for the party wishing to enforce a contract, to show that it was executed in a lucid interval; and if lunacy be objected to the performance of a contract, an issue will be directed to ascertain whether the defendant was a lunatic at the time of the execution of the contract; and, if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval.(s)

(m) De Jur. Bell. et Pac. Lib. 1. c. 22. contra, *Squire v Pershall*, 8 Vis. 3. s. 24. Lib. 3. c. 20. *Brydall's Law* Abr. 334.
of Id. and Non Compos, p. 80.

(n) *Collison's Case*, Hob. 136. sed
vid. *Duke's Charit. Uses*, 78, 110.

(o) *Winchcombe v. Hall*, 1 Ch. Rep.

(p) *Niel v. Morley*, 9 Ves. 478.

(q) *Ib.*

(r) *Owen v. Davis*, 1 Ves. 82.

(s) *Hall v. Warren*, 9 Ves. 605.

Where a party has been subject to a commission, or to any restraint permitted by law, even a domestic restraint, clearly and plainly imposed upon him, in consequence of undisputed insanity, the proof, showing sanity, is thrown upon him: on the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which does not appear to have ever existed, is thrown upon the other side; which is not to be made out by rambling through the whole life of the party, but must be applied to the particular date of the transaction.(r)

Petition of Right.

Petitions of right, it has been said, may be preferred or prosecuted either in the court of chancery, or exchequer.(t) These *596 petitions are in the nature of *an action against the subject, wherein the suppliant sets out his right to that which is demanded by him, and prays the king to do him right and justice; and upon a due and lawful trial of his right and title, to make him restitution. It is called a *petition of right*, because the king is bound of right to answer it, and let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject.(u) The method is this:—the petition is presented to the king, who subscribes it with the words, *soit droit fait al partie*, and thereupon it is delivered to the chancellor in *forma juris exequend.* to be executed according to law, who thereon proceeds in the same legal manner on this petition as in actions;(v) the form of all which, and the manner of entering it on the file or roll, may be seen in *Coke's Entries.*(w) A *petition of right* is applicable also in respect to the *queen.*(x)

(s) Vid. *White v. Wilson*, 13 Ves. 88, 89.; and see Attorney General against Parnter, 8 Bro. C. C. 442.

(t) *Skin*, 609. 3 Black. Com. 256.

(u) Leg. Jud. p. 18.; and see Reeve against Attorney General, mentioned in *Penn v. Lord Baltimore*, 1 Ves. 445, 6.

(v) Leg. Jud. p. 18.

(w) 419. d. 422. b.; and see 8 Co. 422. a. 423. a. See the admirable arguments of Lord Somers in the *Bankers' case*, where much learning will be found on this subject.

(x) *Mitford's Pleadings*, 30. who cites 2 Rol. Abr. 213.

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